UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
24th meeting
held on
Tuesday, 1 November 1994
at 3 p.m.
New York

SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. LAMPTEY (Ghana)

CONTENTS

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/49/SR.24
29 November 1994
ENGLISH
ORIGINAL: FRENCH

94-81935 (E)

The meeting was called to order at 3.50 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. PAMBOU-TCHIVOUNDA (Gabon) said he was pleased that the report of the International Law Commission on the work of its forty-sixth session had focused on the Commission's two spheres of competence, namely, the codification and progressive development of international law. It was none the less regrettable that the Working Group had made only slight and merely formal improvements to the first draft statute for an international criminal court, and that the substantive matters which had prompted less than enthusiastic reactions from the Gabonese delegation had not been resolved. He therefore felt it necessary to reiterate his reservations, starting with general observations and moving on to more specific matters.

2. Noting that a poorly conceived instrument could produce nothing but poor results, he drew attention to three major weaknesses in the draft statute, which clumsily combined substantive and procedural matters, without any attempt to place them in some kind of order. Moreover, a lack of clarity affected the complementary relationship which the draft statute was supposed to establish between the national criminal justice system and the proposed international criminal justice system. There was no indication as to whether that would be a hierarchical type of relationship, or whether the international criminal court would be given an advisory role vis-à-vis national courts or even be competent to vary the decisions of the latter in application of international law. In his delegation's view, the Commission should be wary of exposing the court to the vicissitudes of an outmoded State constitutionalism, which might alter the court's jurisdiction ratione loci and ratione materiae. Lastly, he was baffled by the deliberately created confusion in the draft articles as to the bodies entitled to bring a matter before the court; for although he understood the Commission's desire that reliance on a certain concept of international public order should remain the prerogative of the United Nations Security Council, he wondered why that privilege should not also be granted to any State or group of States, or even the Commission of the European Union, the Council of the League of Arab States or the Conference of the Organization of African Unity.

3. With regard to the jurisdiction of the Court, the list given in article 20 seemed rather inconsistent. Referring to the crimes defined under existing legal instruments, the authors had included the crime of genocide; however, they had left out that of apartheid, just when events in the former Yugoslavia and the treatment of the Kurdish people by the Iraqis and Iranians gave reason to fear that there were those who were still drawn to the South African model. The problem was that it was difficult to assign a substantive purpose to rules which were presumably procedural in nature without confusing the categories involved. The procedural rules could not be usefully applied until the basic rules had been defined under a legal instrument, which could be none other than the draft Code of Crimes against the Peace and Security of Mankind. For that reason his

delegation urged the Commission to devote the whole of its forthcoming session to the drafting of that Code.

4. As to the role of the Security Council, Gabon felt that it was in the interests of the Security Council to have no interaction whatsoever with the court, since there was no guarantee that the cases it might bring before the court would be declared admissible. A series of challenges to admissibility by the court would weaken the Security Council's authority in the matter in question and might well place it in open conflict with the court, a situation which would do little to enhance its reputation. On the contrary, the objective character, in respect of erga omnes applicability, recognized in the statute would ensure the court's true independence, since only States could bring cases before it, which was fully in keeping with the traditional political role of the Security Council.

5. With regard to applicable law, his delegation was surprised at the absence of any reference in article 33 to other sources of substantive international law. The reference to "applicable treaties" was admittedly convenient, but it brought to mind the draft Code of Crimes against the Peace and Security of Mankind, without explicitly referring to it. In point of fact, the code did not yet exist because the Commission was going to great lengths to ensure that it never came into existence. The General Assembly must therefore assume its responsibilities and draw its conclusions from the current situation on the Commission's future work programme. For the time being, his delegation recommended that article 33 should be redrafted to broaden the range of applicable rules, so that over and above the statute, the court could apply the draft Code of Crimes against the Peace and Security of Mankind, treaties relating to certain specific crimes, principles and rules of international law, the relevant acts of international organizations and, if necessary, any rule of national law.

6. Gabon felt that chapter III of the report, entitled "The law of the non-navigational uses of international watercourses", had come just at the right time to enhance the prestige of the Commission, which had been not only realistic in opting for the framework convention but also methodical in avoiding extending the scope of the article to cover confined transboundary groundwaters. His delegation was pleased that the Commission had resisted the temptation to make the regimes applicable to two different types of watercourses. The development of a system applicable to groundwaters would also highlight their particular characteristics, and therefore the particular law applicable to them.

7. His delegation had therefore no hesitation in associating itself with those who had endorsed the draft articles. There were two points, however - one essential the other of minor importance - on which it had some reservations. The former concerned the introductory part on the scope of the articles and use of terms. The current version of the draft convention contained very few definitions, which were none the less important in interpreting treaties. One would have therefore expected greater priority to be given in the draft convention to a definition of its purpose, in particular a definition of the term "uses". Consequently, his delegation proposed that the following

definition should be inserted in draft article 1: "All activities of an industrial, economic or private nature which require special technical works and means in connection with the jurisdiction or control of the watercourse State".

8. The second point referred to draft article 33 concerning the settlement of disputes. His delegation considered that the technical nature of the subject did not justify the great detail in the wording of subparagraph (b). It would be better to keep to the essential point, which was to establish the principle of international fact-finding. He therefore suggested that the detailed provisions of subparagraphs (i) et seq. should be deleted.

9. Lastly, he said that the International Law Commission's treatment of the statute for an international criminal court did not go as far as his delegation had expected. He therefore suggested that the General Assembly should set up ad hoc intergovernmental machinery to re-examine the draft article. His delegation would wish to participate.

10. Mr. GARCIA (Colombia) said that the draft articles on the law of the non-navigational uses of international watercourses made a significant contribution to the progressive development of international law. Nevertheless, it would be useful to give a more precise definition of their scope. Article 3, which allowed States to consult with a view to negotiating watercourse agreements, was quite satisfactory. Referring to articles 5, 6 and 7, he said that differences of opinion on details persisted, although the Commission had made an effort to lay down norms which would enable many States to accede. Similarly, the continuing differences of opinion on articles 8 and 9, 20 to 23 and 27 and 28 did not seem very great and should thus be very easily resolved.

11. With regard to the settlement of disputes, his delegation considered that the arrangement proposed by the Commission was balanced and offered a very wide range of possibilities.

12. Lastly, he strongly recommended that, owing to the highly specialized nature of the subject, the task of drawing up a convention on the law of the non-navigational uses of international watercourses should be entrusted to a plenipotentiary conference.

13. Mr. GONZALES FELIX (Mexico) said that the draft articles on the law of the non-navigational uses of international watercourses were entirely satisfactory. He welcomed particularly the fact that principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, obliging States to refrain from carrying out activities on their territory which might jeopardize a neighbouring State's territory, had been duly incorporated into the draft. Further, the International Law Commission had not simply restated that fundamental principle of international coexistence, but had also established specific mechanisms for translating that obligation into action. Obligations such as due diligence, equitable and reasonable use and the obligation not to cause significant harm were supplemented by the provisions of articles 8, 9, 11, 12, 14 and 17, on the general obligation to cooperate, the regular exchange of data and information, on the obligation to provide timely notification and to hold consultations and

negotiations concerning planned measures. His delegation could only give its fullest support to those provisions, which added weight to the basic obligation to avoid transboundary harm.

14. He welcomed the recognition in the draft of States' right to conclude agreements which would require adjustment or application of the provisions of the projected convention because of the characteristics of any given watercourse, and that, throughout the draft, the adjective "appreciable" had been replaced by "significant".

15. Lastly, the importance of confined transboundary groundwater and the almost total lack of guidelines on their use highlighted the need to establish a framework recognizing the special characteristics of those bodies of water and contributed to their conservation. The subject would require further study and his delegation supported the International Law Commission's decision not to extend the scope of the draft to include confined transboundary groundwater. Nevertheless, it would be necessary in the near future to draw up an international instrument regulating the use of such bodies of water.

16. The delegation of Mexico agreed with other delegations that it was time to adopt the draft and would support any move in that direction.

17. Mrs. BELLIARD (France) said that her delegation did not wish to see the scope of the draft articles on the law of the non-navigational uses of international watercourses extended to include confined transboundary groundwater. The International Law Commission had made a wise decision by placing its recommendations on that subject in a separate resolution, apart from the articles. It would have been possible to include such bodies of water in the framework of the draft only if specific provisions had been incorporated, which would inevitably have further complicated the whole task.

18. In amending the draft, the International Law Commission had rightly been loath to delete from the definition of "watercourse" the requirement for a common terminus. Deletion of that requirement would have added considerably to the ambiguity of the definition. Her delegation regretted, however, that the International Law Commission, in its concern to reach a compromise, had seen fit to state that such a requirement was merely "normal" (so that the new definition read, "normally flowing into a common terminus"). However understandable the underlying considerations which had led the International Law Commission to that wording (for example, the need to cover deltas), there was no guarantee that the adverb "normally" would be explicit enough to avoid confusion.

19. Her delegation considered article 33 on the settlement of disputes to be too restricting. The International Law Commission should have taken a more practical position by allowing the parties to decide what form of settlement would be most appropriate. Her delegation, therefore, did not agree with the numerous detailed provisions the International Law Commission had inserted into the settlement procedures. It particularly objected to the provisions on the composition of the Fact-Finding Commission and the appointment of its Chairman - with reference to the United Nations Secretary-General if necessary - all of

which were too detailed to win the support of many States. Further, such detailed provisions might not be necessary if the preferred form of the articles was that of model rules rather than that of a framework convention. The articles could be considered conventional in nature only if they could be used to draw up a framework convention which would have residual force in relation to specific conventions and would focus on basic principles.

20. Her delegation wished to avoid all conflict between the norms laid down by the draft and those embodied in existing or future watercourse agreements. Specific watercourse agreements which could be concluded in the future should override the general convention. Yet States' ability to conclude an agreement on a given watercourse seemed peculiarly restricted by the provisions of article 3 indicating that, in any case, watercourse agreements would "apply and adjust" the provisions of the framework convention. If, in the context of draft articles laying down principles which at times went beyond international customary law and which went into great detail, "adjustment" could be understood in a very broad sense, then her delegation would find that wording ambiguous and would have preferred to make provision for "waiver of the provisions of the present articles". Further, there was cause for concern in the absence of any mention in the draft of watercourse agreements which had already come into force. She reiterated that it was necessary to stipulate that a prior agreement would retain validity unless the parties agreed to give precedence to the International Law Commission's formulation. In the absence of such provision, the only other possibility would be for each State, on ratifying the treaty, to make a statement of interpretation or a reservation indicating whether they wished to continue to be bound by the previous specific watercourse agreements. That would be very difficult in practice since all States parties to the watercourse agreement would be obliged to make such a statement of interpretation or such a reservation. It would thus not be clear that certain provisions of the draft articles should be residual in nature if it was decided to transform them into a framework convention.

21. A framework convention should remain sufficiently general to apply to the range of different situations throughout the world. Article 5 required States to utilize a watercourse equitably and reasonably. Such a provision in a treaty having the scope of a framework convention would have the effect of giving the obligation of equitable and reasonable utilization the status of a legal norm. That was a considerable step forward but it was not certain that a significant number of States took the same view of that principle. It would have been preferable to adopt a more cautious formulation, such as "the parties shall take all appropriate measures ... to ensure that transboundary waters are used in a reasonable and equitable way", a wording that appeared in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed in 1992.

22. Draft article 24 required that, at the request of any of them, the watercourse States should enter into consultations concerning the management of an international watercourse, which might include the establishment of a joint management mechanism. That wording was an improvement on what had been proposed in earlier years, but it deliberately went beyond the framework instrument, as

seemed to be the intention of the Commission, and beyond international law in force. In existing customary law there was an obligation to consult on a case-by-case basis only when a project relating to a watercourse might seriously compromise the interests of another State.

23. She indicated that none of her observations or queries, taken in isolation, should be regarded as impeding the acceptance of the Commission's suggestion to transform the draft articles into a convention. Conversely, it was the combination of the difficulties which gave rise to the questions raised by the French delegation, in other words, on the one hand, a draft that was very detailed and very forward-looking in terms of international law, which gave it a certain inflexibility that was likely to raise objections on the part of many States, and, on the other hand, a draft which seemed, in many circumstances, to take precedence over the watercourse agreements, a fact which, again, could only reinforce the questioning of many States. The French delegation considered that it would be prudent to go further with a change to a convention only if it appeared clear that there were reasonable chances of success. It must therefore be asked whether the conditions for general acceptance of the draft currently existed. If that were not the case it might be advantageous to restrict the scope of the draft by making substantial amendments to certain articles (in particular articles 3 and 5). It was only after such redrafting had been completed that the question of convening a conference of plenipotentiaries could properly be decided. If, on the other hand, the Sixth Committee were to express its preference for drawing up model rules on the basis of the draft articles prepared by the Commission, the draft might be adopted more or less unchanged and would thus constitute a document of universal reference.

24. Mr. THEUAMBOUNMY (Lao People's Democratic Republic) said that the text of the Commission's draft articles on the law of the non-navigational uses of international watercourses was generally acceptable to his delegation. As far as the form of the draft articles was concerned, his delegation considered that, given the wide diversity of watercourse systems, it would be difficult to prepare a single international convention of universal application and associated itself with the many other delegations that had expressed their preference for a framework agreement.

25. Articles 5 and 7 of the draft together formed the cornerstone of the future instrument. Article 5 set forth the rule of equitable and reasonable utilization, one purpose of which was to avoid any conflict on utilization between the watercourse States. Article 7 provided that the watercourse States should exercise due diligence so as not to cause harm to other watercourse States. It was clear to his delegation that, in practice, when a State envisaged utilization which seemed likely to cause significant and lasting harm of the interests of another watercourse State, such utilization should be deferred until agreement had been reached between them.

26. Article 12, which dealt with notification concerning planned measures which might have adverse effects, was equally important. The principle of prior notification was generally recognized in a number of declarations or resolutions adopted by many intergovernmental conferences and meetings. His delegation

acknowledged the soundness of that article and fully approved its content. According to his delegation's interpretation, the article was intended to assist the watercourse States to ensure that new forms of utilization did not give rise to conflicts.

27. Mr. ELARABY (Egypt) recalled that many great civilizations had arisen and developed along watercourses. That was notably the case with Egypt, which had been described as the gift of the Nile. The international community had long been hesitant about drafting universal rules on the utilization of watercourses. The adoption in 1966 of the Helsinki Rules concerning the utilization of the waters of international drainage basins had taken the form of guidelines rather than of an international instrument. For the Egyptian delegation it was above all important to approach the subject in such a way as to ensure the required balance and constructive cooperation between countries in the non-navigational uses of international watercourses. It was clear that, if a State exercised its right in a manner that was prejudicial to other watercourse States, that would inevitably have adverse effects on the stability of the States and harm their neighbourly relations.

28. In order to achieve the necessary balance between the interests of the watercourse States, a certain number of principles should be reflected in the draft articles under consideration. In the first place, to make optimum use of the watercourses, cooperation between the States concerned should be strengthened through an exchange of information and joint management which might take the form of machinery for the supervision of joint projects for the exploitation of the water resources. In the second place, any discharge of waste which might have an adverse impact on the environment, particularly the marine environment, must be prevented. In that connection, the liability of States for ecological damage likely to affect watercourses, whether in time of war or peace, must be codified. That also meant that watercourse States which planned to undertake projects likely to have an impact on any other watercourse State were obliged to engage in prior consultations. In the third place, whatever the form in which the articles were adopted, it was inconceivable that they could contain provisions contrary to international law in force: bilateral conventions, customary law and principles already established by international committees, judgements or arbitral awards. Any departure from that principle would be likely to erode confidence in the system of international law that had governed watercourses for many years.

29. Fourthly, his delegation considered that in article 7, the requisite balance between the interests of the State causing the harm and those of the State suffering the harm had not been achieved. The article should have expressly set forth the need for all States to refrain from any activity harmful to another State. As currently drafted, it did not oblige the State whose use caused the harm and which was to consult with the State suffering the harm to refrain from that use. It should thus be amended so as to reconcile the interests of all watercourse States. The same was true of paragraph 3 of article 17: it was important that the State in question should delay implementation of the planned measures until the end of the consultations or until the dispute had been settled.

30. In his delegation's view, the draft articles should take the form of a framework agreement, once they had been considered in the General Assembly or by a conference of plenipotentiaries. As for the choice of the body in which the draft articles should be considered, it had no particular preference: the key point was that all States should have an opportunity to participate in that process.

31. Mr. MORSHED (Bangladesh) said that the Commission, in its efforts to contribute to the codification and progressive development of the law of the non-navigational uses of international watercourses and to elaborate universal rules governing the utilization of increasingly scarce water resources and to ensure their protection and conservation, had had to take into account and synthesize the traditional law on the matter, as crystallized in the Helsinki Rules, international environmental law, the volume of which continued to increase, and the 1982 United Nations Convention on the Law of the Sea. However, the balance between those elements that the Special Rapporteur had tried to introduce into the draft articles contained in document A/49/10 was sometimes precarious, threatening to undermine the solidity of the structure as a whole.

32. Article 5 set forth the fundamental rule of equitable utilization, expressing it as an obligation to utilize an international watercourse "in an equitable and reasonable manner" - a phrase which might give the impression that the rule was a procedural rather than a substantive one. The rule was nevertheless strengthened by the introduction of the concepts of "adequate protection" and "participation", although the latter concept was also qualified by the phrase "in an equitable and reasonable manner".

33. The factors relevant to equitable and reasonable utilization, as enumerated in article 6, were integral to the application of article 5 and determined the close relationship between articles 5 and 7. However, the expression "when the need arises" inserted in paragraph 2 of article 6 should be deleted, as it might render the application of the rule of equitable utilization nugatory.

34. In his delegation's view, the greatest difficulty related to article 7, which amended a substantive rule of customary law and abridged the rights of States, while at the same time adversely changing the relationship between articles 5 and 7. The concept of due diligence raised the threshold of harm, and served only to complicate matters further. It was stated in the commentary (p. 237) that due diligence was "an obligation of conduct, not an obligation of result"; and, a few lines later, that it was "an objective standard" - a statement that seemed more accurate. Another difficulty was posed by the question of compensation, referred to in paragraph 2 (b) of article 7. While the "polluter pays" principle was now universally recognized, the same could not be said in respect of other forms of harm; the explanation that pollution affected the quality of water, whereas other forms of harm led to changes in the quantity of water, was not adequate. The Special Rapporteur had himself recognized the functional link between the quality and quantity of water resources. The substitution of the word "significant" for the word

"appreciable" in the title of the article did not take account of scientific and technical advances in the measurement of pollution thresholds.

35. As article 8 was the cornerstone of the draft articles, it should specify the procedures to be applied where there was a breakdown of consultations, a situation which could jeopardize cooperation.

36. Article 32 seemed to focus too closely on the European context in referring to the interests of natural or juridical persons, whereas in the vast majority of water disputes, especially in the developing world, the parties were States, or different provinces of one State. The real interest of the article lay in the fact that it tried to establish uniform rules for settlement of domestic and international water disputes. Settlement of disputes was in fact a key element of the draft articles. For that reason his delegation would wish to see the phrase "if agreed upon by the States concerned" deleted from article 33 (b).

37. With some key changes, the draft articles could be used in the elaboration of a convention by an international conference of plenipotentiaries, which would be in a better position to make use of inputs from the scientific community, universities and experts than would the General Assembly.

38. Ms. BETANCOURT de CALCAÑO (Venezuela) said that, broadly speaking, the effectiveness of the new instrument that might be elaborated on the basis of the draft articles on the law of the non-navigational uses of international watercourses could be compromised by the insertion of obligations that were difficult to define and implementation of which was left too much to the discretion of States. It was not a framework convention in the strict sense, and the draft articles should thus be supplemented by bilateral agreements governing the utilization, exploitation and protection of watercourses.

39. The expressions "significant" and "equitable and reasonable utilization", which appeared in several of the draft articles, were not unambiguous and were likely to give rise to disputes because of the wide range of interpretations to which they were open, even though doctrine and case-law had enabled their to be defined more precisely. In practice, what was equitable for one State was not necessarily equitable for another State. Admittedly, article 6, which set forth the factors to be taken into account in determining whether a utilization was equitable and reasonable, constituted an important contribution, but the connection between those factors and the expression "equitable and reasonable" was not made sufficiently clear. As for article 7, it contained the expression "significant harm", thus introducing an essentially subjective element which, furthermore, was left to the discretion of each of the States concerned.

40. Article 7 also set forth an extremely important rule founded on respect for the principle of the sovereign equality of States, in obliging watercourse States to utilize the watercourse in such a way as not to cause significant harm to other watercourse States. For the reasons previously referred to, the use of the expression "all due diligence" was nevertheless to be regretted, for the obligation was in fact an obligation of result, a concrete obligation that was binding on States. The same criticism could be levelled at the expressions

"optimal utilization" and "adequate protection" in article 8. As cooperation played a key role in the establishment of a balance between the rights and duties of users of international watercourses, it was of the utmost importance to define it precisely and not merely to leave the matter to the discretion of States. Article 9, on regular exchange of data and information, contained a further expression ("its best efforts" - paragraph 2; "their best efforts" - paragraph 3) that weakened the obligation set forth.

41. Her delegation agreed with the content and formulation of article 20 and considered that the term "ecosystems" was the appropriate one in that context. In article 21, the obligation to "prevent, reduce and control pollution", which was of extreme importance, was clearly defined in paragraph 2.

42. Her delegation agreed with the means of dispute settlement listed in article 33. With particular regard to paragraph (c) of that article, the Commission had been right to insert the expression "by agreement", which ruled out unilateral recourse, for that would be incompatible with the nature of the draft articles.

43. Her delegation supported the draft resolution on confined transboundary groundwater adopted by the Commission. It also supported the Commission's recommendation to entrust the task of elaborating a convention based on the draft articles to an international conference of plenipotentiaries, or to the Sixth Committee acting in the capacity of a codification conference.

44. Mr. NGUYEN DUY CHIEN (Viet Nam) welcomed the completion of the work on the draft statute for an international criminal court. Some time would be required, however, for further examination of the draft statute before a diplomatic conference was convened.

45. Turning to the law of the non-navigational uses of international watercourses (A/49/10), his delegation considered that the draft articles were well-balanced. As a watercourse State, Viet Nam understood how important watercourses and their uses were to watercourse States as a whole and to the daily life of people who lived along such watercourses; for that reason his delegation supported the principle of "equitable utilization" laid down in article 5, providing for both the right to utilize the water and the duty not to limit other States in their right to do so. The concept of "equitable participation", embodied in paragraph 2, ensured the goal of optimal utilization, which was achieved when watercourse States cooperated in protecting and developing the watercourse. The right to utilize watercourses was inseparable from the duty not to cause harm to other watercourse States, and that duty should be covered by a clear provision in a future convention. His delegation therefore fully shared Brazil's opinion that there were shortcomings in the current version of article 7, and it felt that the text adopted on first reading should be retained. That would be the only appropriate way to ensure a balance between article 5 and article 7, and between the rights and obligations of watercourse States.

46. His delegation believed that the term "watercourse" in article 2 (b) did

not include confined groundwaters, because the latter had no physical relationship with surface water and thus did not constitute part of a unitary whole. It also felt that the phrase "flowing into a common terminus" should be retained.

47. With regard to the settlement of disputes, he believed that the procedures stipulated in article 33 could be justified by the specific nature of disputes relating to non-navigational uses of international watercourses.

48. Lastly, his delegation expressed its support for the elaboration of a convention on the basis of the draft articles, either by the General Assembly or by an international conference of plenipotentiaries.

49. Mr. MOMTAZ (Islamic Republic of Iran) said that the International Law Commission had overcome the two major difficulties inherent in any attempt at the codification and progressive development of the law of the non-navigational uses of international watercourses, namely, the diverse nature of the various watercourses and the conflicting interests of upstream and downstream States. The flexibility of the draft provisions and the fact that they formed a framework agreement were the best guarantees of its effectiveness and its acceptance by the community of States. The framework-agreement formula had the advantage of stating clearly the principles and rules of general behaviour that watercourse States were required to adapt to each particular case when concluding agreements on international watercourses which were not yet subject to any such agreement. In an area where confusion, and indeed disputes, were common, the draft articles would undoubtedly be extremely useful.

50. The draft laid down two practical rules on the non-navigational uses of international watercourses, considered as the expression of customary law: the right of watercourse States to utilize an international watercourse in an equitable manner and the duty not to cause significant harm to another watercourse State. The carefully prepared commentaries accompanying the relevant draft articles were full of examples drawn from case-law and various schools of thought, illustrating their significant role in the elaboration and development of the law, and bearing witness to the fact that the Commission had produced a fine piece of codification.

51. The rule of equitable utilization as a right was based on the concept of the limited sovereignty of States over their water resources and was aimed at defining the rights and obligations of international watercourse States. In accordance with that rule, the needs of all watercourse States should be taken into account. Water distribution should be so managed that all watercourse States could satisfy their needs for the irrigation of agricultural land. There should be no question of mathematically equal distribution among the States concerned in every case. For that reason his delegation regretted that the Commission had not paid greater attention to the ways and means of implementing draft article 5 and had made no mention of the various apportionment criteria for international watercourse flows, such as equal bases, whether quantitative or territorial, or of the control mechanisms for flow allocation, such as joint commissions with equal representation or hypsometric gauging stations, as laid

down in the various agreements that had been concluded. Such criteria and mechanisms would have appreciably helped arid States - where water was scarce and in great demand - to strike a reasonable balance between their various needs and to ensure that they could enjoy the advantages to which they had a right.

52. Draft article 6, defining equitable and reasonable utilization, was of major importance for his delegation. He praised the restricted, non-exhaustive terms in which it had been possible to define the natural, historical, social and economic factors to be taken into account to ensure the equitable utilization of watercourses. However, although the reference in draft article 6, paragraph 1 (b), to "social and economic needs" was sufficiently broad to cover the use of water for agricultural purposes, the fact remained that in some regions the need for irrigation was so imperative that it merited a specific reference. It was regrettable that the question had hardly been touched on in the commentary to the article. In some parts of the world, such as the Middle East, the main economic function of watercourses remained irrigation, to which numerous treaties gave absolute priority. It was a rule of customary origin but established by treaty law. Indeed, that was the concept behind draft article 10, paragraph 1, which implicitly referred to such situations. In his delegation's view there were grounds for considering that the use of watercourses for irrigation in dry and desolate regions, where water shortage was an obstacle to agricultural development, was necessary for the requirements of "vital human needs", which draft article 10, paragraph 2, stated should be given "special regard".

53. The obligation not to cause significant harm, dealt with in article 7, was a specific application of the principle that territory should not be used in a way that caused harm. In that connection, the concept of "appreciable harm" used in the previous version of draft article 7 seemed more appropriate. The use of the adjective "significant" in the new version lowered the threshold of permissible harm and might give an advantage to upstream States. It was often difficult to define what was meant by "significant harm" and the existing circumstances must be taken into account in every case. While it was generally agreed that States had to tolerate insignificant harm or minor inconveniences arising from the use of watercourses by other States, that did not mean that the harm must necessarily be substantial in order to be taken into consideration. It was unfortunate that the Commission had not made any reference in the commentary to article 7 to certain examples in which the abusive use of a watercourse had undoubtedly resulted in significant harm, such as the case of diverting the water from the basin of another State. In fact, diversions raised the general question of the exhaustive or almost exhaustive use of watercourse flows. They could also change the point at which a watercourse crossed a frontier or lead to an increase in water salinity, thus destroying the ecological balance of a watercourse. The Commission's previous Special Rapporteur for the topic, Mr. McCaffrey, had emphasized in his fifth report the need to ensure a minimal flow in a watercourse so that the various uses made of it could be protected.

54. There was no longer any question that the requirements of neighbourliness restricted the freedom of action a State normally possessed in managing its

territory. It was necessary to reconcile the traditional view of the use of international watercourses, in which the independence of the sovereignty of the State prevailed, with the recent evolution of the rights and obligations by which States were bound in the exercise of their authority. While every State was entitled to construct works on the watercourses which ran through its territory, it was still incumbent on the upstream State to avoid any significant harm to the downstream State which might arise from such works.

55. With regard to procedures for ensuring the equitable utilization of watercourses, his delegation welcomed the fact that part III of the draft dealt entirely with procedural regulations intended to complement the rule of equitable utilization and to guide States in planning watercourse activities. Draft articles 12 to 19, dealing with the obligation of States to notify other watercourse States of planned measures which might have significant adverse effects on them, were on the whole acceptable and would promote cooperation between watercourse States. The issue was particularly topical when in an arid region an upstream State planned to build a hydroelectric power station which would seriously affect the viability of agricultural activities. Those two activities were in fact not entirely compatible: the periods during which water was contained by the dam often coincided with the periods during which a maximum amount of water was needed for irrigation. His delegation was convinced that priority should be accorded to already existing activities in areas where water resources were inadequate and that the upstream State which intended to execute such projects should guarantee a minimum flow to the downstream State. That was, moreover, the approach adopted in treaty law. In such cases, the States concerned would have to negotiate in good faith with a view to concluding an agreement on use of the watercourse. International practice supported the idea that States were obliged to negotiate with a view to reconciling differing interests. The reference made in article 19 to articles 5 and 7 should be understood in that light. If the negotiations were unsuccessful, urgent planned measures must be implemented with due regard to the interests of the other States, without, however, giving them the right to veto the execution of those measures.

56. Part III of the draft covered measures planned by upstream States which could have negative effects on downstream States; those provisions were thus intended to protect the right of downstream States to use of a watercourse. However, in some cases, it was the downstream State which could initiate certain measures to be taken by the upstream State in order to ensure the equitable use of the portion of the watercourse in its territory. In regions such as the Middle East, where, because of seasonal changes, watercourse flows were subject to sudden and extreme variations, it was often necessary to carry out construction work in the territory of the upstream State to regulate and control the volume of water. Numerous provisions in bilateral treaties established a framework for cooperation between riparian States in the construction and exploitation of works designed to guarantee the water supply and to avoid, as appropriate, any harmful effects of the waters. Draft article 25 dealt with the important question of the regulation of watercourses. Paragraph 1 of article 25 specified that watercourse States should cooperate, without stating that an obligation in that domain was incumbent on the upstream State. Current State

practice confirmed the idea that the upstream State was responsible for cooperating with the downstream State. That obligation was justified in so far as failure to respect it might result in harm such as catastrophic flooding of part of the territory of the downstream State, which would undeniably be in violation of the obligation of States under draft article 5 not to cause significant harm. It was in that light that his delegation interpreted draft article 27 on prevention and mitigation of harmful conditions.

57. He wished to make it clear that his comments had arisen from a desire to improve the text and did not in any way call in question the quality of the work accomplished by the Commission and the Special Rapporteur. In fact he shared the view expressed by the Special Rapporteur when introducing his first report on the topic, to the effect that the draft would go a long way towards solving certain problems in the area of watercourses which the world would have to face during the coming decades. According to the regulations adopted in September 1989 by the World Bank, the granting of project financing for hydroelectric installations involving international watercourses was now subject to terms which generally reflected the rules concerning cooperation between watercourse States, such as those formulated by the Commission, requiring in particular a detailed study of the project and its dissemination among all the watercourse States. It was to be hoped that the General Assembly would in the near future adopt a convention on the law of the non-navigational uses of international watercourses, on the basis of the draft elaborated by the Commission.

58. Mr. HALLAK (Syrian Arab Republic) said that he welcomed the adoption on second reading by the Commission of the draft articles on the law of the non-navigational uses of international watercourses. That was a matter of particular importance since water often gave rise to disputes between States. While there were many treaties dealing with watercourses, certain among them had yet to be regulated. It was therefore important to know which regimes and regulations were applicable in the absence of a treaty. The provisions adopted by the Commission thus filled an important gap and his own country was particularly interested in the matter because it shared watercourses with other States. It had followed the work of the Commission with interest and was in favour of adopting a framework convention in that field as rapidly as possible. The procedural provisions of the draft could only be operational in a binding treaty.

59. He welcomed the balance the draft had achieved between the various interests of riparian States and the principles of sovereignty and independence of States. The rule that States should endeavour, in the optimal use of a watercourse, to reduce to a minimum any harm to other States was completely justified. It was also appropriate that, under article 6, social and economic needs of watercourse States were among the factors that had to be taken into account in determining equitable and reasonable utilization. His delegation also endorsed the definition in draft article 2 of the term "watercourse", in particular the words "normally flowing into a common terminus", even though they made the provision somewhat cumbersome.

60. His delegation hoped that the draft prepared by the Commission would be adopted in the form of a convention as rapidly as possible.

The meeting rose at 6.10 p.m.

UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
25th meeting
held on
Wednesday, 2 November 1994
at 10 a.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. MADEJ (Poland)

CONTENTS

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continu)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/49/SR.25
17 November 1994

ORIGINAL: ENGLISH

94-81965 (E)

The meeting was called to order at 10.25 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. CALERO RODRIGUES (Brazil) said that the International Law Commission had completed its work on the substantive consequences of internationally wrongful acts (cessation of wrongful conduct, reparation and guarantees of non-repetition), adopting four articles. It had not adopted four other articles dealing with the instrumental consequences of such acts (countermeasures), sent to it the previous year, because the corresponding commentaries were not available. The Special Rapporteur had suggested modifications to two of the articles and they had been sent back to the Drafting Committee, which had approved a new version for one, but not the other. Having received the Committee's report, the Commission had provisionally adopted three of the articles, but had deferred action again on the fourth. Since one of the three articles adopted might be revised in the light of what was subsequently decided regarding the fourth, the Commission had decided not to submit the articles adopted to the General Assembly, given that the four articles were intended to be a coherent ensemble dealing with all aspects of countermeasures. He expressed the hope that the Commission would find a satisfactory solution to the issue that had been holding up the adoption of the articles, namely, the conditions to be observed for a State to be entitled to take countermeasures.

2. From a logical standpoint, his delegation found countermeasures distasteful: a State which considered itself injured by what it saw as a wrongful act by another State could, so to speak, take the law into its own hands and apply to that other State measures aimed at forcing it to amend its conduct. Stronger States found it effective in the defence of their rights, but weaker States could not have any reasonable expectation that their countermeasures would have any effect on more powerful States. Moreover, the application of countermeasures was not subject to any external control of the actual existence of a wrongful act. There might be a dispute as to whether a wrongful act was committed, but a settlement of that dispute might take a long time. Meanwhile, the State continued to suffer from the countermeasures; it might eventually receive reparation for the harm caused, but only after a possibly long period of damage which might leave a permanent effect on its economy. If recourse to countermeasures could not be eliminated outright, it was at least indispensable to devise a system to prevent States from taking countermeasures without previous determination by an independent third party that the action was justified. The same should apply to the observance of the conditions and limitations established for countermeasures.

3. Although the Commission had devoted a great deal of attention to the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles, the problem was far from resolved. He wondered if the Commission should not have been aware on two occasions that it was moving into a quagmire in which it might get bogged down. The first had been when it adopted article 19 of part one, establishing a distinction between "ordinary"

internationally wrongful acts ("delicts") and particularly serious wrongful acts ("crimes"). The second was when, following the logic of part one, it had decided, at the suggestion of the Special Rapporteur, to give full, separate treatment to the consequences of crimes. That decision had exacerbated the problem, since the Commission had found itself facing the task of addressing the consequences of crimes in separate provisions, instead of simply considering what consequences should be attached to crimes in addition to the consequences entailed by any internationally wrongful act, as had been proposed by a former Special Rapporteur, Mr. Willem Riphagen. It was clear from the report how many problems were involved and how many solutions could be reasonably argued. Although the Commission had not formally accepted the suggestion that it should reconsider article 19 without waiting for the second reading, a debate had taken place on whether the article should be deleted or modified, if only to avoid the use of the word "crime". The debate over whether the consequences of crimes should be fully different from those of delicts or whether the concept of reparation could be used in both cases had continued, and the issue of whether reparation could have a punitive character had also been addressed.

4. There had been controversy with regard to the instrumental consequences. It had been pointed out that countermeasures were conceived on a bilateral basis, even for the breach of erga omnes obligations. The question therefore arose as to how to proceed if the obligation breached was aimed at safeguarding the fundamental interests of every State. In principle, it would be up to the community of States to react. If that meant the United Nations, the further question was whether such a reaction was the responsibility of the Security Council, the General Assembly or the International Court of Justice. Such a theoretically correct approach could result in paralysis. The complexity of those and other problems was such that some members of the Commission had suggested that if it really intended to conclude the first reading by the end of the current mandate of its members, it should put aside the consideration of the question of the legal consequences of international crimes and defer it to the second reading, when its deletion or modification might provide a solution. Despite the fact that such a procedure would leave an undesirable gap in the articles, his delegation would reluctantly consider accepting it on practical grounds. He was glad that the Special Rapporteur had said (A/49/10, para. 343) that he had sufficient indications to enable him to work out proposals relating to the consequences of crimes in time for the next session. It was to be hoped that such an optimistic assessment would prove correct.

5. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the curious numbering of the articles on the matter provisionally adopted by the Commission, reflecting the imprecise indication of the order in which the articles were to be placed, indicated that the Commission was not sure what structure to give to the instrument being prepared. The Commission had had doubts regarding the scope of the topic from the very beginning. On the one hand, it would have been natural to conceive the articles on liability as a counterpart of those on State responsibility. The obligation of States to make reparation for harm caused to other States which had not committed an internationally wrongful act would be recognized on the basis of the principle

sic utere tuo ut alienum non laedas. It had been argued, however, that such an approach found no support in existing practice and that it would represent too progressive a development of international law. Attention had therefore been directed towards measures of prevention; that was not wrong in itself, but it had deflected attention from liability proper.

6. According to a decision taken by the Commission in 1992, it would first consider measures of prevention and only then proceed to remedial measures, which might "include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused". Moreover, the preventive measures on which the Commission would initially work would be in respect only of activities having a risk of causing transboundary harm, not activities actually causing harm. Only then would the Commission "decide on the next stage of the work". The possibility therefore existed that liability proper, understood as a general obligation for reparation of harm caused, would not be dealt with in the articles. His delegation would find that a very frustrating result. While he had serious reservations with regard to the Commission's approach to the topic, he welcomed the well-balanced, well-structured articles on prevention adopted by the Commission.

7. Mr. YAMADA (Japan) said that since the Commission had only provisionally adopted draft articles on the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles, reserving the right to review them, he would merely offer two brief observations. First, he reiterated his delegation's concern over the very slow pace of the drafting exercise on the subject of State responsibility. When the Commission discussed the topic, the real issue it had to address was the conflict between reality and the ideal. If the Commission pursued an ideal too far removed from reality, its work could become meaningless since the resulting draft articles might not be accepted by States. On the other hand, if it were guided solely by stark prevailing realities, the progressive development of international law would be impeded. A balance should be found between the two, and the scope of discussions should be limited. It was inappropriate to spend so much time discussing issues not based on State practices, such as the notion of "State crimes".

8. Secondly, even if a serious breach of essential international obligations had consequences different from those arising from other breaches of international obligations, an institutional mechanism should be established that would be acceptable to a large number of States, whereby internationally wrongful acts - which in the future might be called "crimes" - could be identified and defined; responsibility could then be determined and disputes settled.

9. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, great progress had been made, particularly in comparison with the previous year. He felt that draft article 1 - covering activities "which involve a risk of causing significant transboundary harm" - was phrased too abstractly. Although it had the merit of permitting a flexible application of the articles, he was concerned that an

excessive burden might be placed on potential States of origin. It might therefore be worth considering the addition of at least an illustrative list of activities falling within the scope of the draft articles. He was pleased to note that the draft articles provided for obligations relating to prevention in a fairly comprehensive way and in a logical sequence. He also believed that the decision to remove the article concerning the minimization of harm once it had occurred, proposed in the Special Rapporteur's ninth report, was correct.

10. Although time had not permitted the Commission to consider the Special Rapporteur's tenth report (A/CN.4/459), it dealt with interesting and important aspects of the topic of international liability, such as prevention ex post, the relationship between State liability and civil liability, specific issues in the field of civil liability and the question of procedural channels to enforce liability. The report provided an excellent basis for the Commission's future work.

11. Mr. WANG Xuexian (China) said that it would be difficult for the Commission to formulate draft articles on the consequences of State crimes until the concept of State crimes had been defined. His delegation thus welcomed the resumed discussion on article 19 of part one of the draft articles at the Commission's forty-sixth session.

12. Although the question of the criminal responsibility of States formed part of the debate on international law theory, the international community had not established laws concerning State crimes and their consequences. Certain questions had to be answered in international legal instruments, such as whether the concept of State crimes would be recognized in international law, who would have jurisdiction if that concept was recognized and whether such responsibility differed from ordinary internationally wrongful acts. His delegation believed that, given the limited number of principles of international law that were currently universally recognized and the current structure of international relations, it would be difficult to introduce the concept of criminal acts into the topic of State responsibility and to codify a series of laws for that purpose. It thus hoped that the Commission would approach the matter with caution.

13. On the question of jurisdiction in respect of internationally wrongful acts, his delegation believed that there was some merit in the argument that the existing United Nations machinery should be fully utilized to solve the problems faced by the international community, but that the question of whether those organs should be designated to judge internationally wrongful acts nevertheless needed careful study. The General Assembly and Security Council were political organs functioning under the authority of the Charter of the United Nations, not judicial organs mandated to judge breaches of international law by a State and to mete out punishment. Although the International Court of Justice was the main judicial organ of the United Nations, it could not exercise jurisdiction in respect of internationally wrongful acts of a State, because, under the terms of its Statute, the consent of a State constituted the basis for its acceptance of the Court's jurisdiction. Furthermore, the mandates and responsibilities of the General Assembly, the Security Council and the International Court of Justice

were all derived from the Charter. It would not be appropriate to establish new mandates for those organs through the draft articles of a convention on State responsibility.

14. Because of time constraints, the Commission had not discussed the draft articles on countermeasures formulated by the Drafting Committee in part two of the draft articles on State responsibility. However, since the Commission expected Member States to discuss those draft articles at the current session of the General Assembly with a view to providing guidance for the next stage of its work, his delegation wished to make some comments on draft article 12 (Conditions relating to resort to countermeasures), which was one of the more controversial articles.

15. His delegation supported the Drafting Committee's basic approach, namely, that settlement of a dispute by peaceful means should be considered before the victim State resorted to countermeasures. However, in drafting the article, the Drafting Committee had not taken into account various peaceful settlement mechanisms provided for in international law. While including the requirement that a third party must be used in settlement proceedings as a precondition for countermeasures, the Drafting Committee had overlooked the role of negotiation as the most direct and effective means of peaceful settlement. His delegation believed that both means could be the precondition for countermeasures.

16. In addition, China was in favour of allowing for exceptions when preconditions for countermeasures were established, as that would enable the victim State to adopt provisional countermeasures in order to limit and reduce the damage done to it before it initiated and completed procedures for a peaceful settlement of disputes. That should be required in order to protect the interests of the victim State.

17. Mr. CISSE (Senegal) commended the Commission for completing its work on a draft statute for an international criminal court. His delegation was of the view that a permanent international criminal court could offer fuller guarantees of objective, impartial and uniform application of the code of crimes against the peace and security of mankind than would ephemeral, ad hoc jurisdictions. The establishment of an international criminal court should put an end to the current practice of setting up ad hoc tribunals authorized only by Security Council resolutions, as well as avoiding a proliferation of similar institutions or the creation of regional courts.

18. On the question of the relationship of the court to the United Nations, his delegation did not oppose the solution proposed by the Commission, but would have preferred the bolder solution of making the court an organ of the United Nations. The problems posed by that solution did not seem insurmountable, particularly now that there was increasing recognition of the need to revise other aspects of the Charter.

19. Turning to the question of crimes within the jurisdiction of the court (art. 20), he said that genocide naturally fell within the court's jurisdiction under the terms of the Convention on the Prevention and Punishment of the Crime

of Genocide, which provided for genocide to be tried by such international penal tribunal as might have jurisdiction. He noted that aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity were also listed in article 20, but were not defined therein, and that it was left to the draft Code of Crimes against the Peace and Security of Mankind to accomplish that extremely complex task.

20. In his delegation's view, the crime of apartheid should be explicitly mentioned in article 20, and not relegated to an annex. The fact that apartheid had been eliminated in one African State did not mean that there was no risk of its re-emerging elsewhere. Illicit traffic in narcotic drugs should also have been explicitly referred to in article 20: it was too often forgotten that it was in connection with that crime that the Commission had been entrusted with the task of drafting a statute for an international criminal court.

21. In spite of those reservations, his delegation accepted the definition of the court's jurisdiction ratione materiae contained in article 20. It was, however, unable fully to accept the preconditions to the exercise of jurisdiction set forth in article 21. That provision established a twofold precondition: first, the State bringing the complaint must be a party to the statute; and secondly, that State must have accepted the court's jurisdiction in respect of the crime under consideration. That twofold requirement created needless obstacles to access to the court. In his delegation's view, accession by a State to the statute should automatically imply acceptance of the court's jurisdiction in respect of the crimes listed in article 20, without the need for any additional formal acceptance thereof. International criminal law could not be entirely subordinate to the consent of States: it was also subject to the requirements of international public order. That concept of public order should determine the differences between the statute of an international criminal court and the Statute of the International Court of Justice. The latter Court dealt chiefly with disputes between States in which international public order was not necessarily an issue. Consequently, any attempt to model the statute of an international criminal court on the Statute of the International Court of Justice would be both futile and dangerous. The small, weak States needed an international criminal court, to the mandatory jurisdiction of which all States, whether small or large, would be subject.

22. On the question of access to the court, under the draft statute only States parties could refer a case to the court. The question whether a State that was not a party to the statute should also have access to the court, subject to sharing the costs of the proceedings, called for further consideration. All States should be encouraged to have recourse to an international jurisdiction the role of which would be to ensure peace through application of the rule of law.

23. International organizations, particularly those active in the defence of human rights and humanitarian law, should also be able to bring a complaint before the court where grave and deliberate violations were involved. The Security Council's powers in that regard should also be considered, for it, too, was an international organization. Opinion within the Commission was divided

on that issue. Some feared abuses by the Security Council, and considered that, as a political organ, it should be kept apart from the functioning of a judicial organ. Others thought that, as the guardian of international public order, it would be failing in its mission if it did not refer cases to the court in the situations provided for in Chapter VII of the Charter. That did not, of course, mean that the Council should intervene in the court's internal functioning or exercise any form of supervision over it. His delegation believed that the Security Council should be able to refer to the court any situation that constituted a threat to international peace and security. It was for States to exercise vigilance and to ensure that the Council did not exceed its powers.

24. The international community was in increasingly urgent need of an international criminal court. The Commission had done excellent work on the question, and had completed that work punctually. It was now for the international community to sanction that work by convening a diplomatic conference on the question.

25. Mr. GONZALEZ FELIX (Mexico) said, with regard to State responsibility, that inclusion of the concept of countermeasures and the distinction between crimes and delicts would delay completion of the work on that topic. The distinction between crimes and delicts as embodied in article 19 of part one of the draft articles had given rise to much debate in the Commission and the Sixth Committee; yet the need for such a distinction had still not been clearly established. His delegation believed that the distinction raised a series of questions which could not be satisfactorily answered, given the current state of international relations. One of the core aspects of international liability was the need for a link between the injured party and the party engaging in unlawful conduct. It was that link that gave a State the right to require reparation from another State. The draft articles must contain elements making it possible clearly to identify the party entitled to initiate an action for reparation.

26. Mexico had repeatedly expressed its rejection of recourse to countermeasures. However carefully regulated, the legitimization of reprisals in response to an unlawful act would tend to exacerbate disputes between States. His delegation hoped that the Commission would give further thought to the possible consequences of such measures and would eliminate them from the draft articles.

27. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he said that the increasing number of activities involving the utilization of hazardous materials or substances that might have a transboundary impact conferred particular importance on the draft articles. Mechanisms must be established to prevent and deal with the possible consequences of utilization of hazardous materials. Mexico shared the view that States engaging in hazardous activities must not only take preventive measures, but must also ensure that operators under their jurisdiction were complying with those measures, failing which they must assume subsidiary liability.

28. One fundamental part of the draft articles dealt with the field of prevention. His delegation believed that it was enough for an activity to involve a risk of causing transboundary harm for it to be included in the scope of application of the draft articles. States that might be affected by hazardous activities carried out in the territory of another State must necessarily be considered within the prevention mechanism. In that regard, notification and exchange of information and prior consultation became indispensable elements of the draft articles. It was entirely reasonable that a State that might be affected by a hazardous activity should be informed of that possibility, and should be able, not only to put forward its point of view, but also to adopt preventive measures to deal with possible effects in its territory. His delegation supported the approach adopted by the Special Rapporteur in that regard, and hoped that the scope of the provisions could be made as precise as possible.

29. Mr. PASTOR RIDRUEJO (Spain) said that there were now two bodies of opinion in the Commission on the subject of the consequences of acts characterized as international crimes. According to one view the distinction made in draft article 19 between international crimes and delicts was not only conceptually accurate, but was rooted in positive international law and in the realities of international life; in short, it was lex lata. According to the other view, such a distinction lacked coherence and a basis in positive international law and was, at best, lege ferenda.

30. That basic discrepancy with regard to the concept of international crimes had determined the respective approaches to their consequences. For those who defended the concept, the commission of an international crime would give rise to a general right to submit claims - the so-called actio popularis principle - and would be accompanied by the imposition of other penalties. However, for those who contested the concept, there would logically be no difference between the consequences of the commission of a delict and of an international crime.

31. In the light of current State practice, it could be said that there were two major categories of violations of international law, depending upon the significance of the norm violated and the seriousness of the violation. At the political level, it was clear that neither public opinion nor States themselves attached the same importance to minor violations of international law - for example, the occasional breach of a trade agreement - as to major violations - for example, a situation of massive and systematic violations of the most basic human rights. In the first case, such a violation elicited concern only in the affected State while, in the second case, the violation caused alarm throughout the international community, leading to a collective response.

32. His delegation believed that international law should be consistent with State practice in terms of distinguishing between the two types of violations: serious violations (referred to as "crimes" in draft article 19) and lesser violations (referred to in that article as "delicts"). That distinction should also extend to the consequences of the commission of either act; in other words, the commission of a crime should give rise to the obligation to make reparation

and to the imposition of other penalties, while the commission of a delict should entail simply the obligation to make reparation.

33. In view of the seriousness of the consequences entailed by an international crime, the question arose of who determined that a crime had been committed. Obviously, such a determination could not be left to the unilateral discretion of States, but must be made in an institutionalized way. That was where the insufficient institutionalization of the international community became evident. Within the United Nations, only one body, the Security Council, had the power to determine, under Chapter VII of the Charter, that such crimes as threats to the peace, breaches of the peace and acts of aggression had been committed, and to impose the relevant penalties. Furthermore, the Security Council was not an independent judicial body, but an intergovernmental body which basically exercised police functions. A jurisdictional body, such as the International Court of Justice, would be in a better position to determine independently that an international crime had been committed and to impose the corresponding sanctions. However, in the last analysis, the Court's competence was voluntary, and not only was there significant reluctance to accept its jurisdiction, especially in respect of the most serious disputes, but even those States which had made unilateral declarations accepting the Court's jurisdiction had done so with major reservations.

34. Accordingly, his delegation believed that while the concept of an international crime was well grounded in the legislative sphere, the application of the concept in the institutional sphere ran up against difficulties that could only be overcome through the relevant reforms of the Charter of the Statute of the International Court of Justice. Unfortunately, the international community did not yet appear to be ready for such reforms. Nevertheless, his delegation supported the retention in legislative texts of the concept of an international crime, as it would promote the progressive reform, development and strengthening of international institutions.

35. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, chap. V), he noted with satisfaction that the Commission had provisionally adopted several articles on prevention of transboundary harm. That was commendable in the light of the conceptual difficulties involved in the consideration of the topic, especially the distinction between primary and secondary rules. In that connection, his delegation remained convinced that the acts envisaged in the articles provisionally adopted were not prohibited by primary rules of international law; accordingly, his delegation was not satisfied with either the general wording of the topic or article 1 entitled "Scope of the present articles", because it specifically referred to "activities not prohibited by international law". Nor did his delegation endorse the use of the term "sensible" in the Spanish version of article 1 and the following articles, as it believed that the appropriate term in Spanish should be "significativo".

36. Mr. HALFF (Netherlands), referring to chapter IV of document A/49/10, said that his delegation supported the distinction between "crimes" and "delicts". That distinction reflected the difference between basic infringements of

international public order and ordinary delicts which did not threaten the foundation of international society, namely, the coexistence of sovereign States.

37. There were no convincing reasons why, as a matter of principle, a State could not incur criminal responsibility; accordingly, the maxim societas delinquere non potest, according to which a State, including its people as a whole, could not be a subject of criminal law, did not apply. In his country, legal entities could be held criminally responsible, particularly for certain economic or financial offences, even though technically such entities could not have mens rea. There was no reason why particularly serious acts committed by individuals using the territory and resources of a State could not, under certain conditions, be imputed to the State, thus leading to that State's criminal liability. Indeed, the concept of State responsibility for ordinary delicts was also based on the concept of imputing to the State acts of individuals or other entities operating as State organs.

38. While his country was aware that the need to impose criminal responsibility on States had been questioned on the ground that the same objective could be achieved through the concept of jus cogens or erga omnes obligations, the Netherlands believed that the concept of an international crime and that of a breach of jus cogens or erga omnes obligations need not always correspond exactly. While an international crime would always involve a breach of a jus cogens or erga omnes obligation, a breach of such an obligation would not always constitute an international crime.

39. His delegation believed that article 19, as currently drafted, was satisfactory and should be retained, subject to possible improvements based on developments in State practice or in the light of the consequences to be attached to the commission of an international crime.

40. With regard to the important question of who determined that an international crime had been committed, the Netherlands believed that to leave such a determination to the discretion of individual States was far from ideal and that ultimate determination should be reserved for an impartial and independent international judicial body, such as the International Court of Justice, either by providing for compulsory jurisdiction or through acceptance of jurisdiction in an additional protocol.

41. With regard to aggression (art. 19, para. 3), nothing could prevent the Security Council from determining, in accordance with the powers conferred on it by the Charter, that an act of aggression had occurred, provided that the act constituted aggression under the terms of Article 39 of the Charter. The same would apply to the categories of internationally wrongful acts referred to in article 19, paragraphs 3 (b) to 3 (d), provided that they entailed a breach of the peace within the meaning of Article 39 of the Charter. However, it should be stressed in that connection that in determining the existence of such acts, the Security Council was endowed with political powers in the exercise of its primary responsibility of maintaining international peace and security.

42. With regard to the question of who could legitimately react, either by claiming compliance with substantive obligations or by resorting to countermeasures or sanctions, the Netherlands believed that such a reaction should ideally emanate from an international organ capable of interpreting and implementing the will of the international community as a whole. There, too, the special political and policing role of the Security Council, in terms of its power under Chapter VII of the Charter to impose sanctions in order to maintain international peace and security, should be recognized.

43. With regard to the substantive consequences of the commission of an international crime, his country was of the view that such consequences should be qualitatively different from those arising from the commission of delicts from the standpoint of reparation and satisfaction. Therefore, a restriction normally applying to restitution in kind and relating to the excessive onerousness of such restitution need not apply, draft article 7 (c) notwithstanding. Moreover, satisfaction could include not only heavy "punitive damages", but also measures affecting the dignity of the State which committed the crime.

44. With regard to countermeasures, a distinction should be made between the consequences of crimes and of delicts. His delegation would await further proposals on that subject from the Special Rapporteur. Such proposals should pay due attention to the impact of the exacerbated countermeasures on the population of the State which committed a crime. A general obligation on the part of all States not to recognize as valid in law any situation from which the law-breaking State derived advantage as a result of the crime, or a general obligation not to help the law-breaking State in any way to maintain the advantageous situation created by the crime, would appear to be an acceptable countermeasure.

45. However, it should be clear that resort to the use of force should remain prohibited, except in the case of measures taken in individual or collective self-defence or those adopted by the Security Council under Chapter VII of the Charter in situations involving the crime of aggression. Even in response to a crime, the use of force should remain the exclusive prerogative of the organized international community and particularly of the Security Council, prior authorization from which should remain a prerequisite for the use of force in cases other than aggression, including genocide or humanitarian intervention.

46. Moreover, in adopting countermeasures in response to crimes, injured States should remain bound by the principle of proportionality.

47. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries and referring to chapter IV of document A/49/10, said that the Nordic countries still held the view that the distinction between crimes and delicts was relevant. For example, the crime of genocide, or a crime against peace, such as aggression, was, of course, committed by individuals and not by legal entities such as States. However, crimes such as genocide were directly or indirectly imputable to a State since they were normally carried out by State organs, implying a sort of "system criminality". In such situations, responsibility

should not be limited to the individual acting on behalf of a State. The State itself must also bear a share of responsibility, whether through punitive damages or measures affecting the domestic jurisdiction and dignity of a State. That point of view was supported by the wording of article 5 of the Draft Code of Crimes against the Peace and Security of Mankind, which provided that prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it.

48. If the term "crime" as applied to a State was too controversial, it might be preferable to use the terminology employed in the 1949 Geneva Conventions on the protection of victims of war, which referred to "grave breaches" of the Conventions. Accordingly, a distinction would be made between "breaches" and "grave breaches", using as a criterion the degree of gravity of the wrongful act.

49. The question of who determined that a crime had been committed did not appear to be different from the same question in connection with ordinary delicts or breaches. Where no compulsory dispute settlement procedure was in force between the parties to a conflict involving the question of State responsibility and its implementation, the alternative was to leave it to the States involved to determine the character and consequences of the wrongful act alleged to have been committed. While that was not a very satisfactory solution, it was a well-known problem affecting most rules of international law given the current organization of the international community. The possibility of involving the International Court of Justice in the determination of a crime or a grave breach, along the lines of the judicial settlement procedures contained in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties, could be further explored. Another possibility would be to draft an article along the lines of Article VIII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provided that a Contracting Party could call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they considered appropriate for the prevention and suppression of acts of genocide. However, the Commission itself should not engage in a review of the powers of the General Assembly or the Security Council.

50. Ms. DAVIDSON (United States of America) said that it was an inappropriate and unproductive use of the Commission's time to try to develop, under the rubric of State responsibility, new rules concerning international crimes by States. The views of other States reflected considerable scepticism and resistance to that notion, and the Commission's report raised numerous issues.

51. First, the actions that might be taken by States which entailed the responsibility of other States operated along a continuum. More egregious acts might entail more severe consequences, such as countermeasures by other States, reparations, punishment of individuals for grave breaches of the laws of war, and even recommendations, provisional measures and forcible and non-forcible measures by the Security Council operating under Chapter VII of the Charter. Attempting to establish one category of actions as "crimes" which merited action

by the international community unnecessarily limited the flexibility of operating on that continuum. Establishing a category of State "crimes" inevitably must be either an artificial construct or must rely on a case-by-case appraisal by the international community, in which case the utility of the concept appeared minimal at best.

52. Secondly, application of the nomenclature "crime" to those more egregious actions did not reflect contemporary State practice. The concept of crime was rooted in international law, but only as applied to individuals, not States. One of the key developments in that area was the treatment of a decision to resort to war unlawfully as a criminal act for which the leadership of a State might be punished. That development, however, was not applicable to States as States. Furthermore, the most recent war crimes tribunal, the International Tribunal for the former Yugoslavia, had no jurisdiction to consider "crimes" of States and to hear charges of crimes of aggression by individuals. The international community had therefore approached the issue of crimes under international law in a deliberative and cautious manner which was not at all reflected in the Commission's work on State responsibility. Indeed, international tribunals had traditionally refused to assess punitive damages against States partly because of the absence of malice on the part of a Government of a State, as opposed to on the part of an individual.

53. Thirdly, to the extent that the Commission was seeking to express the law as it ought to be, application of the concept of "crime" to States was undesirable. Doing so neither advanced nor clarified the state of the law. Rather, it obscured it by attempting to apply a concept of domestic law built upon the mens rea of the individual, to a State. Furthermore, if the fundamental objective was to deter unlawful behaviour, the appropriate manner for doing so was to channel criminal responsibility to the individuals within the offending State that had decided to undertake the State action. Establishing the criminal responsibility of the State as a whole risked diluting the deterrence sought by regarding individuals as criminally responsible. Her delegation agreed with that of Austria and others that the Commission was delaying completion of its important work on State responsibility by allowing itself to be distracted by the unpromising notion of so-called State crimes.

54. With regard to the other articles of part two of the draft articles, the United States had already expressed its concerns over the formulations of articles 7, 8, 10 and 10 bis. Article 14, on prohibited countermeasures, raised difficulties because it purported to prohibit certain actions regardless of the action of the wrongdoing State. Thus, if a wrongdoing State was inflicting extreme economic or political coercion which endangered another State's territorial integrity or political independence - such as the imposition of economic sanctions that prevented the import of essential civilian goods - that other State might not undertake comparable countermeasures in an effort to end the coercion. States could not and would not accept such a prohibition. Similarly, under article 14, if a wrongdoing State had seized the diplomatic premises of another State, that other State might under no circumstances seize the diplomatic premises of the violating State. In such circumstances, the other State had a duty to respect and protect the diplomatic premises of the

wrongdoing State, but requiring the other State to continue to treat those premises as inviolable indefinitely was unreasonable and inconsistent with State practice. The presence of article 13, on proportionality, made article 14 unnecessary; States might only respond in proportion to the degree of gravity of the initial act and the effects thereof. So long as the initial act did not consist of the actions stated in article 14, then the responding State could not undertake such actions.

55. Article 13 was itself somewhat broad and should be crafted to allow specialized treaty regimes, where they existed, to govern the countermeasures that might be taken for violations of those regimes.

56. She noted that the Commission had chosen two important and timely new topics, namely, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", for its future work.

57. Mr. PFIRTER (Observer for Switzerland) said that the distinction between the two categories of internationally wrongful acts made in article 19 of part one of the draft articles on State responsibility had raised a number of questions which underscored the political and legal complexities of the issues involved. Since the possibility that such a distinction would need to be reflected in the respective consequences of the two categories of acts could not be excluded, it would be inopportune to call into question the structure and content of article 19. That article had been carefully worded and constituted an excellent working base for the Commission, which should be encouraged and supported in its study of the consequences of particularly serious violations of international law.

58. The view that the essential characteristic of the concept of crime was that it freed State responsibility from the limitations of bilateralism was open to challenge, since any breach of an obligation erga omnes simultaneously and legally injured all States concerned by that obligation. It was true, however, that the expression "crime" had the clear psychological advantage of stressing the exceptional seriousness of the breach concerned, which should spur the international community to take action, either within the framework of institutions or through individual States, to defend the rights and interests of both the victim State and international community.

59. The concept of crime was an evolving one conditioned by the degree of seriousness of the internationally wrongful act. It referred to the breach of an obligation erga omnes the seriousness of which affected peaceful coexistence among States and the foundations of the entire international community. The seriousness of the violation of public international law thus distinguished crimes from other internationally wrongful acts which did not affect the fundamental interests of the international community and which could be characterized as ordinary delicts.

60. While it might be tempting to replace the term "crime" by another expression lacking in penal connotation, the advantages of using the term were

considerable, since its use was without prejudice to the nature of the liability arising from a particularly serious breach of international law. As several members of the Commission had pointed out, the responsibility of States was neither criminal nor civil. It was simply international, different and specific, and it was therefore pointless to give further consideration to the validity of the maxim "societas delinquere non potest" in international law.

61. Most members of the Commission were of the view that State responsibility was rigorously circumscribed in the draft articles to the obligation to make reparations, which did not imply any punitive element. The aim of the draft articles was certainly not to punish the wrongdoing State. At the same time, however, it was not merely to obtain reparations for an internationally wrongful act. Before the injured State demanded compensation for the injury suffered, it was essential that the State which committed such an act should cease such action.

62. Given the way in which the international community was currently organized, it would be for each State to determine the commission of a particularly serious violation of jus gentium. While such a solution was by no means ideal, since States, especially those directly affected, might be guided by subjective considerations, a number of safety nets existed. For example, a State whose conduct was based on its perception of what constituted a crime must be aware that its responsibility might be engaged even in the absence of any fundamental violation of international law. Also, the measures which a State proposed to take in reaction to an international crime would be subject to certain conditions, compliance with which could be verified by the rest of the international community on the basis of objective criteria. Finally, before one or more injured States were permitted to react individually, they should be encouraged to react collectively or to agree on the countermeasures that would best ensure the cessation and reparation of a particularly serious violation of international law.

63. In that regard, the General Assembly, the Security Council and regional organizations had an essential role to play. Lest the concept of crime should lead to the confirmation of existing power relationships, it was important to ensure that, with the exception of self-defence, States were given the right to intervene individually only where there was no collective reaction or where such reaction was impossible.

64. It had been rightly pointed out that the recognition of the concept of crime did not mean recognition of an absolute and unlimited right to resort to countermeasures or of lex talionis by individual States or by the international community as a whole. Without calling into question the right of victims to receive reparation and satisfaction, the vital importance of reconciliation should not be overlooked.

65. In order to contain any risk of escalation which might be harmful to the stability of the international community, the substantial and instrumental consequences of internationally wrongful acts should contain no punitive aspects. While it might not be possible to totally eliminate the punitive

element of the consequences of such an internationally wrongful act, that aspect as well as the aspect of revenge must be rigorously circumscribed in order to prevent a dangerous exacerbation of tensions.

66. The prohibition of the use of force and the principles of peaceful settlement of disputes and proportionality were rules which must be respected in any legal regime governing reactions to the commission of a crime. The severity and scope of the legal consequences of a particularly serious violation of international law should not exceed the threshold beyond which excessive punishment was inflicted on the population of the wrongdoing State. It must be remembered that, whatever their nature, the measures which would be taken would always directly or indirectly affect populations which for the most part were innocent.

67. While the search for a balanced solution was certainly not easy, Chapter VII of the Charter and the practice of the Security Council might perhaps be helpful, even though the Chapter in question had not been conceived in terms of the establishment of a regime of State responsibility.

68. Switzerland did not fully share the view of the Special Rapporteur that the right to resort to countermeasures should be made subject to less strict conditions in the case of crimes than in the case of delicts. Making such conditions less strict might send a false signal to States which considered themselves victims of a crime that they had more latitude where countermeasures were concerned. Instead of contributing to the restoration of the status quo ante, such a step would reduce or even eliminate the possibility of effectively achieving that objective through collective reaction.

69. On the other hand, his delegation shared the view of the Special Rapporteur and of most members of the Commission on the possible intensification of the countermeasures envisaged for delicts which did not involve the use of force. It would be better, however, to avoid measures which had particularly harmful consequences for the general population.

70. His final remarks concerned the general obligation not to recognize the consequences of a crime and not to assist the "criminal" State. The reasons for making a distinction between those two obligations were not clearly set out. In fact, the obligations were one and the same. To recognize as valid in law a situation in which the State which committed the crime benefited from that crime would be tantamount to helping that State to maintain the situation that was created. Similarly, to assist a State which had committed a crime in retaining the resulting benefits was the same as recognizing the legal consequences of the acts committed.

The meeting rose at 12.25 p.m.

UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
26th meeting
held on
Thursday, 3 November 1994
at 10 a.m.
New York

SUMMARY RECORD OF THE 26th MEETING

Chairman:	Mr. LAMPTEY	(Ghana)
later:	Mr. CHATURVEDI (Vice-Chairman)	(India)

CONTENTS

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/49/SR.26
21 November 1994

ORIGINAL: ENGLISH

94-82001 (E)

/...

The meeting was called to order at 10.30 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/4/10; A/49/355; A/C.6/49/L.5)

1. Mr. YOUSIF (Sudan) said that, with regard to chapter II of the Commission's report, concerning the draft statute for an international criminal court, as his delegation had stated at the previous session of the General Assembly, there should be no relationship between the court and the United Nations. His delegation requested the revision of the articles that conferred on the Security Council the right to refer certain matters to the court. The retention of article 23 of the draft statute would mean that the criminal court would be subject to the political influence of the Security Council and would thus forfeit its independence and distinctive character. It would also give the permanent and non-permanent members of the Security Council an advantage not enjoyed by the other States parties to the statute with regard to the initiation of criminal prosecution.

2. Article 6, paragraph 5, of the draft statute provided that, in the election of the judges, the representation of the principal legal systems of the world should be assured. It was not specified in paragraph 5 what the principal legal systems of the world were. They should be identified and should include an express mention of Islamic criminal law among the principal legal systems to be represented when judges were elected. Islamic criminal law was in effect over an extensive area among more than one billion Muslims. Moreover, the concept of applying the principle of equitable geographical distribution was inappropriate for the purposes of the establishment of an international criminal court.

3. Article 12 of the draft statute failed to mention the number of deputy prosecutors to be elected by an absolute majority of the States parties. The article should be reworded so as to be more specific on that point.

4. The question of the general jurisdiction of the proposed court and the specific crimes coming within its jurisdiction was the pivotal point of the draft statute and still raised some difficulties. In his delegation's view, article 20 of the draft statute as currently worded would serve as a good working basis but was not final. It might be appropriate to envisage drawing up a code of international crimes, as proposed by the representative of Sri Lanka in the Commission, in accordance with the principle nullum crimen sine lege. Such a code might draw on the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind, the crimes specified in international treaties and the other crimes referred to in article 20 of the draft statute.

5. His delegation supported the views expressed concerning the exceptions referred to in article 42, paragraphs 2 (a) and 2 (b), on the basis of the principle non bis in idem. Those two paragraphs were in blatant contradiction with article 14, paragraph 7, of the International Covenant on Civil and Political Rights. Account should also be taken of the fact that the purpose of an international criminal court was to be complementary to national criminal

justice systems, as stated in the preamble of the draft statute, and not to be regarded as a new and separate jurisdiction.

6. The present discussion should focus on those articles that had not been the subject of unanimous agreement, and subsequently an international conference of plenipotentiaries could be convened to approve the statute.

7. His delegation endorsed the Commission's recommendation in appendix I, that the statute should be attached to a treaty between States parties and that such treaty should provide for the establishment of the court and for the supervision of its administration by the States parties. According to the degree of international acceptance, consideration might be given to making the international criminal court part of the organic structure of the United Nations, together with any other amendments that States might wish to make to the United Nations Charter.

8. With regard to chapter III of the Commission's report, concerning the law of the non-navigational uses of international watercourses, his delegation still had difficulty in accepting the term "groundwaters" as a part of the definition of a watercourse in article 2 (a) of the draft articles. It believed that the term "groundwaters" should be clarified in the text by using terms similar to those found in paragraph (4) of the commentary to article 2 of the draft articles. The difficulties raised by the use of the term perhaps lay in the possibility of a State's claiming that it was the watercourse State according to the definition set forth in paragraph 2 (c), if its territory contained groundwaters that fed a watercourse that did not pass through its territory. That could cause innumerable problems for the other States through whose territory the surface portion of the watercourse passed. Such claimant States might also seek to exercise the rights accorded to the other watercourse States under article 4.

9. In his delegation's view, article 6, concerning factors relevant to equitable and reasonable utilization, and particularly paragraph 1 thereof, lacked balance by comparison with article V of the Helsinki Rules. Articles 32 and 33 constituted important additions to the draft articles. The principle of relief to natural or juridical persons in the area who suffered harm as a result of activities related to an international watercourse should be established in article 32 at a subsequent stage or through international watercourse agreements concluded by States in the light of the draft articles. Article 33 should lay down the concept of mandatory resort to arbitration or judicial settlement, since the issue of the scarcity of water resources throughout the world was bound to raise many difficulties in the future and therefore affected international peace and security. Recourse to arbitration or judicial settlement should put a decisive end to disputes in that crucial area. Accordingly, subparagraph (c) greatly weakened the effectiveness of article 33.

10. His delegation supported the Commission's recommendation contained in paragraph 219 of its report and was in favour of the idea of convening an international conference of plenipotentiaries on the basis of the draft articles. Such a conference would give participating States an opportunity to delegate their legal and technical experts to put the final touches to the draft

articles. His delegation also supported the Commission's resolution on confined transboundary groundwater, which commended States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate.

11. The Sudan welcomed the Commission's appointment of two new Special Rapporteurs. With regard to the Commission's contribution to the Decade of International Law, his delegation was pleased to note that 33 members of the Commission had expressed readiness to contribute to a publication containing studies by members of the Commission. His delegation hoped that the General Assembly would consider the possibility of earmarking funds for the issuance of the publication in all the official languages of the United Nations and favoured the inclusion of a provision to that effect in the resolution on the Commission's report to be adopted at the current session.

12. His delegation commended the cooperation between Commission members and a number of other bodies. It hoped that that pattern of cooperation would continue. It also commended the Commission's decision to participate in the United Nations Congress on Public International Law, to be held in New York from 13 to 17 March 1995, and hoped that the Chairman of the Working Group on a draft statute for an international criminal court and the Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses" would participate, inasmuch as those two topics constituted an important development of international law.

13. His observations on the draft statute for an international criminal court and on the law of the non-navigational uses of international watercourses were initial ones and subject to the final opinion of Sudanese experts in criminal law and watercourse specialists when they participated in the relevant conferences of plenipotentiaries.

14. Mr. MIKULKA (Czech Republic) said that the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined groundwaters elaborated by the Commission reflected both its interest in developing international law and its responsiveness to current realities. The draft text on international watercourses was an improvement over the earlier version and provided a sound basis for future work. His delegation endorsed the Commission's recommendation that a convention should be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles, and it was willing to cooperate in such an endeavour.

15. The topic of State responsibility rightly occupied an important place on the Commission's agenda. The Commission had made progress by provisionally adopting articles 11 and 14, on countermeasures, and article 13, on proportionality, for inclusion in part two of the draft articles on State responsibility. On the whole those articles were satisfactory. The Commission had wisely postponed the adoption of article 12, on conditions relating to resort to countermeasure, and it was to be hoped that it could revise that key article to make it universally acceptable. He hoped, too, that generally

acceptable wording could be found for the provisions relating to dispute settlement procedures to be used prior to taking countermeasures.

16. At its last session, the Commission had had a rich and stimulating debate on the question of the consequences of acts which were characterized as crimes under article 19 of part one of the draft. In distinguishing between crimes and delicts, the Commission had combined codification and progressive development of the law, as it had done in other circumstances. The Commission must not limit itself to an analysis of positive law. A balance had to be maintained between codification and progressive development. It was not enough to take note that a specific category of crimes did not exist in the practice of States; it was also important to give due consideration to theory and to practices that might arise from it.

17. The proposed distinction between categories of internationally wrongful acts was based in part on the hypothesis that there was a difference between the responsibility incurred in the case of delicts and that incurred in the case of crimes. If that was not the case, the distinction on which article 19 was based was not justified. In any event, until the Commission had completed its consideration of the question, it was best not to reopen debate on article 19, which might well be subject to further modification by the Commission.

18. At its most recent session, the Commission had engaged in an unproductive debate on the use in article 19 of the term "crime". No analogy could be made between the use of that term in the article and its meaning within the realm of domestic criminal law. In the sense of article 19, "crime" did not imply that a State was criminally responsible; it simply indicated that a State had breached an international obligation which was essential for the protection of the fundamental interests of the international community. The use of that term should be without prejudice to the determination of the nature of the responsibility for a particular crime.

19. It followed from article 19 and the commentary thereto that crimes represented particularly grave breaches of peremptory norms of international law (jus cogens). Jus cogens obligations were erga omnes obligations, which did not allow for any derogation, including by means of an agreement between the parties concerned. Similarly, there could be no derogation (between parties) from the secondary rules governing the responsibility of States for infringement of jus cogens obligations.

20. Some of the difficulties that arose in attempting to determine the consequences of international crimes were directly linked to the ambiguities of primary rules. While a list of international crimes would greatly facilitate such a task, it was practically impossible to arrive at a list that would be universally acceptable.

21. Article 19 contained a general characterization of international crimes rather than a set of precise definitions. Such a general approach was adequate for the draft text, which ought to be limited to secondary rules. The definition of specific crimes should be dealt with in other instruments.

22. The absence of a list of international crimes made it difficult but not impossible to determine the consequences of State crimes. The non-exhaustive list provided under article 19, paragraph 3, provided a sound basis for attributing criminal responsibility to States. Certain crimes, such as aggression or genocide, were reasonably well defined: they were regarded by the international community as violating its fundamental rights and were also considered as crimes by the opinio juris of the international community. However, in the view of some, the current organization of the international community and the absence of a legal mechanism which had the power to determine whether a State had committed the crime in question were obstacles to identifying the consequences of international crimes. While such a mechanism was clearly needed, its absence should not hinder efforts to determine consequences. The Commission had been able to identify the consequences of international delicts even in the absence of a body with responsibility for determining that such acts had been committed.

23. One of the most important issues arising from the topic of State responsibility was whether and to what extent the articles dealing with the consequences of delicts could be applied to crimes. His delegation took the view that two separate systems of responsibility were needed - one dealing with delicts and one dealing with State crimes. While there was no difference between crimes and delicts with regard to the cessation of a wrongful act, that was certainly not the case with regard to reparation lato sensu. Given that crimes were harmful to the international community as a whole and violated peremptory norms of international law, restitution in kind was of particular importance. It might even be said that there was an obligation not to recognize the consequences of a crime. Restitution in kind in the case of crimes should not be subject to the restrictions envisaged under article 7 (c) and (d) on proportionality. Moreover, in the case of crimes, in contrast to delicts, the choice between restitution in kind and compensation was eliminated: compensation should not be available to the State victim of a crime unless restitution in kind was materially impossible or entailed a violation of jus cogens.

24. Satisfaction should include prosecution of those individuals who had helped prepare a State crime or who had actually committed it. Such an approach reflected the link between State responsibility for international crimes and the criminal responsibility of individuals who committed such crimes.

25. In respect of the instrumental consequences of a crime, priority should be accorded to a collective response by the international community as a whole. Countermeasures should be used only in the absence of collective action.

26. His delegation noted with satisfaction the Commission's adoption of articles 1, 2 and 11 to 20 relating to international liability for injurious consequences arising out of acts not prohibited by international law. Those articles dealt mainly with the question of prevention and were a step forward in that area.

27. Mr. PIBULSONGGRAM (Thailand) said that the atrocities committed in an ever-increasing number of States had created an urgent need to establish a

permanent criminal court which would ensure that the perpetrators of crimes against humanity were brought to justice and which might prevent reoccurrences of such crimes. Ad hoc tribunals were not adequate for that purpose because they might apply international criminal law inconsistently.

28. The draft statute for an international criminal court had been significantly improved and was, in its current form, a more balanced text with greater chances of being widely accepted by States.

29. In his view, a multilateral treaty was the only sound legal basis for the establishment of the court. It was the only way that States could decide freely whether or not to accept the statute and jurisdiction of the court. Any other manner of establishing the court would give rise to serious difficulties. Once created, the court should have a close relationship with the United Nations to ensure its universality and authority.

30. In revising the draft statute, the Commission had endeavoured to allay States' concerns that the court might displace national jurisdiction or interfere with existing arrangements for international cooperation and judicial assistance. However, much work remained to be done in that direction. Jurisdiction of the court should be granted largely on the basis of consent, except in certain specific cases. His delegation was pleased to note that the draft text provided for an opting-in system under which a State party to the statute of the court accepted its jurisdiction by means of a special declaration. Such an approach would ensure broader acceptance of the statute.

31. The draft statute rightly emphasized that the court should complement national criminal justice systems. However, he wondered whether that would be the case in practice. It was important that the jurisdiction of the court should be limited to the most serious crimes.

32. His delegation agreed that the Security Council should be vested with the power to refer cases to an international criminal court. However, given the political nature of the Security Council, it was perhaps inadvisable to give it such a key role.

33. Two of the draft articles were particularly welcome: article 37, under which trials <u>in absentia</u> were excluded except in circumstances which might be regarded as falling outside that category; and article 6, under which the term of office for judges was fixed at nine years.

34. The draft statute was a positive attempt to resolve many of the thorny issues involved in establishing an international criminal court. Despite its many shortcomings, the statute could serve as a basis for future negotiations. In that regard, he endorsed the recommendation to convene an international conference of plenipotentiaries to conclude a convention on the court; the convention should be preceded by a preparatory meeting to negotiate difficult issues.

35. Turning to the draft articles on the non-navigational uses of international watercourses, he noted that Thailand, as a watercourse State, had a keen

interest in the subject of watercourses and was in a particularly good position to appreciate the complex issues involved. It was essential to strike a balance between the sovereign rights of States and the community of interests, an aim which was reflected in the draft articles in the concept of equitable and reasonable utilization and participation and the obligation not to cause significant harm. Those terms were still not defined precisely enough, which made it difficult to achieve such a balance.

36. Circumstances varied so widely among States that it was difficult to formulate definitions that would satisfy all those concerned. Specific agreements and consultations in the spirit of cooperation among watercourse States could be of great help in arriving at satisfactory and acceptable solutions. However, under no circumstances should the process of consultation be considered to prejudice the sovereign rights over and optimal utilization of watercourses by watercourse States.

37. Recognizing that water resources were vitally important to many States, his delegation agreed that there was a need to elaborate a system of rules concerning confined transboundary groundwaters. It also agreed that a convention based on the draft articles should be elaborated by the General Assembly or by an international conference.

38. Ms. ŠKRK (Slovenia) praised the Commission for its outstanding work in completing the draft articles on the law of the non-navigational uses of international watercourses and resolution on confined transboundary groundwater. Since there were few States that did not qualify as watercourse States, the legal and functional range of the draft articles - which might be called the future Magna Carta on international watercourses - was therefore almost universal and should be approached with corresponding devotion and care.

39. The use of international watercourses for navigational purposes was not entirely excluded from the text, but was merely not regulated by it. Article 1 implied that the articles became operational for the navigational use of an international watercourse in cases of collision between navigational and non-navigational uses of the watercourse. It was assumed that such a conflict of interest should be solved according to the principle of equitable and reasonable utilization of an international watercourse.

40. Since the future convention on the matter was envisaged by the Commission as an umbrella convention, giving the opportunity to individual watercourse States to conclude special or subregional agreements, as required, the draft articles should be viewed as being of a dispositive nature, apart from part II (General principles). The possibility for watercourse States to become parties to watercourse agreements would, in her delegation's view, contribute to the strengthening of cooperation between watercourse States and thus diminish the likelihood of disputes. In that connection, she believed that draft article 4, paragraph 2, was not clear and should be carefully reconsidered before its final adoption.

41. She concurred with other delegations in considering that part II was the core of the text. The principle of equitable and reasonable utilization and

participation, enshrined in article 5, should be understood as a balancing factor between the watercourse State's sovereignty over its portion of an international watercourse and the legitimate uses and interests of other watercourse States. She also agreed with the view expressed in the commentary that the principle of optimal utilization did not necessarily mean the "maximum" use of a watercourse, but the most economically feasible and, if possible, the most efficient one, since an international watercourse was not an inexhaustible natural resource. Article 7, meanwhile, required a State to exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States. By applying the due diligence test, the Commission had taken the position that a State was not strictly responsible for its conduct or for damage resulting from activities under its sovereignty. She noted that the draft articles were silent with regard to watercourse States' liability for damage.

42. Articles 8 and 9 enshrined well-established practices on cooperation and exchange of information between States. Article 10 required special attention, stipulating as it did that no use of an international watercourse enjoyed inherent priority over other uses. Although the text admittedly stated that special regard should be given to the requirements of vital human needs, she would prefer the point to be more emphasized, given that drinking water was a basic need closely related to the right to life.

43. She was concerned about the provisions of article 23 on the protection and preservation of the marine environment, which introduced the long-distance water pollution approach to the use of international watercourses. Yet according to international legal theory and State practice, States' obligations with regard to transboundary harm on the one hand and long-distance pollution on the other differed. Apart from article 23, the draft articles basically applied to transboundary effects caused by one watercourse State on another. Pollution from land-based sources was, however, currently the major concern of coastal or estuary States. Under the provisions of draft article 23, a watercourse State which was not necessarily a coastal State of the sea area where the common terminus flowed, or even a land-locked State, faced the possibility of having to take part in action to protect or preserve the marine environment.

44. With regard to emergency situations (art. 28), she believed that there should be more detailed rules on assistance to watercourse States affected and that effective contingency planning should be an essential part of any environment-oriented agreement. Her delegation was pleased to note that provisions on international watercourses and installations in time of armed conflict (art. 29) had found a place in the draft articles. The protective clause should, however, also apply to reprisals in time of war.

45. Lastly, she believed that some final provisions remained to be elaborated, including the determination of the number of States parties required for the entry into force of the future convention. Article 311 of the United Nations Convention on the Law of the Sea might provide useful guidance in establishing the relationship between the draft articles and existing international river and watercourse agreements.

46. As for the Commission's other decisions and conclusions (chap. VI), her delegation believed that the Commission had achieved a great success with regard to the codification and progressive development of international law in respect of the law of treaties, and specifically reservations to treaties. It was also glad to note that State succession and its impact on the nationality of natural and legal persons featured among the list of topics before the Commission. She pointed out, however, that the codification and progressive development of the law on State succession, as enshrined in the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, both of which had been drafted by the Commission, had not met with great success in the contemporary practice of States. Neither Convention was yet in force, even though they regulated the basic questions of State succession including that regarding the unification and dissolution of States. Caution should therefore be shown in developing new projects in that field. It might be argued that the two Conventions did not deal with nationality, which must therefore be dealt with separately. According to the existing practice of States, however, a State's right to grant or deny its nationality to a natural or a juridical person originated in the State's sovereignty over its territory and the individuals therein. The well-established international standards with regard to changes of citizenship and dual citizenship would have to be observed on a non-discriminatory basis.

47. Mr. BERMAN (United Kingdom), before turning to other matters, regretted that standards had slipped with regard to the early distribution of the Commission's report before the start of the General Assembly. It was not reasonable to ask Governments for rapid action at the General Assembly if they had had virtually no time to absorb and reflect on the new material put forward in the report.

48. With regard to the law of the non-navigational uses of international watercourses, he commended the Commission on the simplicity and directness of style in which the draft articles were cast and for the clarity of the commentaries. He reiterated his Government's support for the adoption of a framework convention, the work on which could be completed in the Committee at a future session. Nor did his delegation see that there was any necessary incompatibility between the framework convention approach and model rules or recommendations. Although the United Kingdom had little substantive national interest in the non-navigational uses of international watercourses, it did have such an interest in how a convention would fit into the overall corpus of international law, notably that on the environment. In that context he particularly welcomed the Commission's decision to replace "appreciable" by "significant" in the qualification of transboundary harm. The change was more than just a drafting nicety; it served to situate the articles properly within the emerging system of rules in the environmental area. Noting that draft article 7 - in which, as elsewhere, the change had been made - and its relationship to draft articles 5 and 6 were the heart of the matter, he said that the way found by the Commission to make the two principles - the obligation not to cause significant harm as against equitable and reasonable utilization and participation - independent but not separate seemed an ingenious solution to a most difficult problem.

49. With regard to State responsibility, it was clear from paragraphs 230-346 of the report how divided the Commission was on whether a distinction between "crimes" and "delicts" was possible and whether it was relevant, in terms of the consequences; whether such a thing as an "international crime" existed; whether a State could incur criminal responsibility; and whether criminal responsibility was necessary in draft articles on State responsibility, the object of which was compensation, not punishment. The controversy reinforced the reservations expressed by his delegation and others the previous year; the reference to "crimes" in article 19 should simply be dropped. Not only would maintaining the reference call in question the acceptability of the final version of the draft articles, but it was debatable whether the Commission could afford to spend on one issue of doubtful utility the time implied by 117 paragraphs of the report, if it was to complete the first reading by 1996 as it intended.

50. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he said that the wisdom of the Commission's decision in 1992 to give priority to measures of prevention in respect of activities carrying a risk of causing transboundary harm was demonstrated by the results achieved by the Commission at its forty-sixth session. The draft provisions in respect of prevention already formed the basis of a coherent and self-contained topic. His delegation was grateful to the Special Rapporteur for the thought he had given to the relationship between State liability and civil liability in his tenth report and it endorsed what it took to be his view that the consequences of a breach by the State of origin of the obligations of prevention laid down in those articles would be the consequences established by the ordinary rules of international law on State responsibility. There was no need to add any special provisions on liability in the same instrument. Moreover, activities which in fact caused harm in their normal operation could be brought within the preventive regime of the articles, provided that the harm was foreseeable. It might be also that the Commission could usefully add some articles on prevention ex post to complete the topic of preventive measures. If a decision on the future of all the articles were to be postponed to await the completion of new work on liability, however, there was a risk that the whole endeavour would be overtaken by new developments elsewhere. The main concern was to ensure that the valuable material produced by the Commission was put to practical use for the benefit of the international community. He therefore encouraged the Commission to bring its work on preventive measures to fruition, to complete the first reading of a complete set of articles on State responsibility and to bear in mind the possibility of the early submission of reports or studies on new topics to the Committee, on the basis of which the General Assembly could determine the direction of future work.

51. Mr. NATHAN (Israel), speaking on the topic of State responsibility, said that it was his delegation's view that criminal acts could indeed be committed by States: the tragic events of the Second World War provided ample illustration of criminal acts committed by States, in respect of which those States had later admitted liability and had provided some financial recompense for the material consequences of the crimes committed. Likewise the obligation imposed upon Iraq to pay compensation to Kuwait and to individuals under the relevant Security Council resolutions following its invasion of that country in

1991 had been intended, not to punish the State that had committed the crimes, but to induce it to make financial amends for the damage caused. Criminal acts were in fact committed by physical persons; but when those acts were committed for the purposes of the State, on its behalf and under its authority, the acts were imputed to the State, which became responsible for them in the same manner in which, under municipal law, a corporation became responsible for criminal acts committed by its officers and could be punished for them by the imposition of financial penalties.

52. While reserving its position on the formulations contained in article 19 of part one of the draft articles, his delegation felt that State responsibility might have its origin in liability arising out of criminal acts and in liability arising out of wrongful acts that were not of a criminal nature. To that extent it accepted the crime/delict distinction that lay at the root of the provisions of article 19, a distinction which in the main was based on the effects of the wrongful acts or omissions on the international community at large and on their particular gravity. His delegation concurred with the view that, for the purposes of the draft articles, the question was not one of criminal or civil responsibility as such, but of State responsibility that arose out of criminal or delictual acts. Of course, owing to the entirely different character of a criminal act and a delictual act, the consequences arising out of those acts would also be entirely different.

53. His delegation wished to make some general comments on the principles set forth in articles 11 to 14, currently before the Commission. Countermeasures were generally recognized as a reflection of the imperfect structure of international society, which had not yet succeeded in establishing an effective centralized system of law enforcement. The question whether countermeasures had a place in the law of State responsibility was a highly complex one. It could be argued that to uphold the legitimacy of countermeasures might seriously affect the rule of law, give rise to abuse, and enable the more powerful States, which were themselves very often the wrong-doing States, to gain an undue advantage over weaker States. While those were legitimate concerns, it should not be overlooked that in certain extreme cases, States might have no alternative but to resort to countermeasures, provided that safeguards existed to prevent the abuse of the right in question, the exercise of which should in any case be conditional upon compliance with such safeguards.

54. Without wishing to engage in a premature discussion of the provisions of the relevant articles, his delegation submitted that there should be no resort to countermeasures until efforts to arrive at an amicable settlement through direct negotiations between the parties had failed; that any countermeasures taken by the injured State must be in proportion to the gravity of the wrongful acts that had given rise to them; and that countermeasures conflicting with the purposes and principles of the Charter and with the general principles of international law should not be admissible.

55. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, para. 380), he said that, while reserving its position until provisions concerning such matters as international State liability, the

liability of the operator and recourse against third parties had been drafted, his delegation considered that the object of the draft articles was to strike a balance between the sovereign right of the State of origin to use, develop and exploit its natural resources and its obligation to exercise that right in such a manner as not to cause significant harm to other States. With regard to article 11, on prior authorization, consideration should be given to a provision for withdrawal and renewal of the authorization. Article 12 was incomplete in that it did not deal with the results of the assessment and the considerations that must guide the competent authorities of the State of origin following the results of the assessment.

56. Article 13 did not spell out who was to be liable for any harm caused by the unauthorized activity. Furthermore, the operator should be required to cease the activity involving the risk and seek the necessary authorization, pending which the operator, not the State, should be liable, unless the State had failed to provide in its legislation for the need to obtain prior authorization, or had failed in its duty to exercise due diligence to ensure that such authorization was obtained. Pending authorization, such activities should not be carried out.

57. In his delegation's view, article 14 should properly be the first article in chapter II, as it established the basis for the obligations of the State of origin. Furthermore, measures taken after the occurrence of the accident should not be dealt with in the context of prevention, but in the context of remedial action. States should see to it that the relevant measures were not only adopted but also enforced. On article 16 bis, he said that, although the subject of information to the public might be one of domestic concern, the information to be provided was to be viewed as of international concern, and vital interests of the population, affecting its basic rights, were in any case involved.

58. Article 18, on consultations on preventive measures, set forth minimum provisions needed to ensure the prevention of transboundary harm.

59. His delegation proposed that the words "referred to in article 1" should be added after the word "activity" in lines 1 and 3 of paragraph 1 of article 19 - a formulation that had been adopted in paragraph 2 of that article. Alternatively, a definition of the term "activity" might be included in article 1. Furthermore, it was not clear what would happen if a difference of opinion arose as to whether or not the activities in question were covered by article 1. As for paragraph 2 of article 19, it was reasonable that the State which had denied the existence of the risk should bear an equitable share of the cost of the assessment. On the other hand, as was pointed out in paragraph (8) of the commentary to article 19, a situation might be envisaged where the State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm. On article 20, he said that paragraphs (a) and (c) of that article overlapped, and could perhaps be merged.

60. In his delegation's view, the instrument eventually to be adopted need not necessarily take the form of a convention. As the activities in question would mainly, if not exclusively, affect neighbouring States, the drawing up of

guidelines to form the framework for regional arrangements should be considered.

61. Mr. KOTZEV (Bulgaria) noted the Commission's discussion of the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles on State responsibility had been fraught with controversy. His delegation believed that to draw a distinction between infringements of international public order and internationally wrongful acts was the right approach, and that the Commission should elaborate two regimes of legal consequences, one for delicts and another for violations of erga omnes obligations. It was confident that, by adopting a more pragmatic and flexible approach, the Commission would be able to produce a well-balanced consensus text acceptable to a broad section of the international community.

62. On the question of countermeasures, his delegation reserved its right to present its comments when further action on that question had been taken by the Commission. Meanwhile, it wished to state at the outset, first, that countermeasures should be applied with great caution and restraint; and secondly, that, as a rule, countermeasures should not have a punitive character.

63. Paragraph 1 of article 11 accurately reflected the essential aims of countermeasures, namely: to achieve cessation of the internationally wrongful act; and to induce the State which had committed the internationally wrongful act to resolve the dispute with the injured State.

64. Article 13 was of paramount importance, since it effectively established parameters for the lawfulness of countermeasures. His delegation considered that the text of that article should also contain a provision requiring countermeasures to be proportional in type to the internationally wrongful act. In other words, the obligation not complied with by the injured State must, wherever possible, be the same obligation, or the same type of obligation, as that breached by the State which had committed the internationally wrongful act.

65. Consideration of article 13 should be systematically linked with that of article 14, since resort to the countermeasures listed in article 14 would in practice constitute resort to countermeasures out of proportion to the initial offence. Two principles should be observed in formulating article 14: first, it should contain an exhaustive enumeration of prohibited countermeasures; secondly, it should explicitly state that, in resorting to countermeasures, a State must not commit acts characterized as crimes under article 19 of part one of the draft articles.

66. His delegation shared the view that countermeasures should be permitted only when all means of peaceful settlement had been exhausted. However, provision could be made for some exceptions, enabling the injured State to take provisional countermeasures in order to limit or reduce the harm before initiating procedures for the peaceful settlement of disputes.

67. Turning to the topic of international liability, he said that the draft articles adopted by the Commission at its forty-sixth session were well balanced and well structured, and properly reflected such important issues as the determination of types of activities involving a risk of causing significant

transboundary harm, the content of the "due diligence" obligations and the comprehensive concept of prevention, comprising both prevention ex ante and prevention ex post. His delegation shared the view that a differentiated approach would be required for those two aspects of prevention. The proposals made by the Special Rapporteur in his tenth report constituted an excellent basis for the future work of the Commission on that topic. He hoped that the Commission would be able to draft a comprehensive set of articles in respect of activities involving a risk of transboundary harm at its next session. However, the scope of the topic should not be confined to the prevention of risk activities; the Commission should also develop the concept of State liability, taken to mean a general obligation of reparation for harm caused; and should elaborate and possibly adopt a set of draft articles on that issue during the term of office of its current members.

68. The progress achieved by the Commission at its forty-sixth session was due in large part to improvements in its methods of work. The allocation of more time to the Drafting Committee and the establishment of various working groups had proved very positive moves. His delegation hoped that the Commission would make further efforts to revise its methods of work, in order to complete its work programme during its present members' term of office.

69. Mr. VILLAGRAN KRAMER (Guatemala) said that in considering the distinction between international crimes and delicts, the Commission had endeavoured to determine whether the two offences gave rise to the same type of international liability. In the 1970s, when article 19 of part one of the draft articles had been adopted, members of the Commission had indicated their concern with establishing guidelines for distinguishing between crimes and delicts. His delegation had stated at the time, and continued to believe, that the debate in the Commission was disorienting. It was clear from the Commission's consideration of the draft Code of Crimes against the Peace and Security of Mankind that there were some international crimes which the international community believed should be punished in some fashion. It was therefore difficult to envisage the concept of an international crime disappearing from the provisions on State responsibility, with sole emphasis being given to delicts. The distinction between crimes and delicts should not be viewed only in terms of the seriousness of the violation of customary or treaty obligations involved; it should be borne in mind that not only the victim State but the international community as a whole was injured by such acts.

70. It must be recognized that there was no international body which could determine whether a delict or a crime had been committed. The current state of international law explained why regimes of countermeasures were necessary in order to compel a State which caused damage to other States to make reparation.

71. The work accomplished by the Commission was sufficient to enable it to complete the draft by 1996. His delegation, like that of Japan, urged the Commission to complete parts two and three of the draft articles on State responsibility before the expiry of the mandate of its current members.

72. With regard to countermeasures, while the Commission had not produced draft articles on the subject, it was reasonable to expect that there would be a

difference between countermeasures applying to delicts and those applying to crimes. For example, in respect of reparation and restitution in full, an illegal occupation of a territory would involve not only the return of that territory, but other obligations and responsibilities as well.

73. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, chap. V), he said that States themselves were experimenting with ways of dealing with situations arising out of acts not prohibited by international law, as shown by the texts produced by the Council of Europe and the European Union. The Commission's work was based on the well-established principle of sic utere tuo ut alienum non laedas (using one's own property so as not to injure the property of another) in international law. However, the Commission would need to determine what type of harm it wished to prevent. Progress was also being made in the area of prevention; States were prepared to accept provisions governing their conduct, not just the consequences of acts already performed. The Commission believed that it was important for States to secure prior authorization for acts liable to cause transboundary harm. In view of the world-wide debate over deregulation, the Commission might be treading on dangerous ground. While his delegation would view sympathetically any language which might resolve the issue of transboundary harm, it was unclear what the reaction of the private sector might be in countries with a capitalist economy.

74. The model followed by the Commission, that of basing responsibility on fault, might detract from the theory of responsibility based on risk. His delegation urged those States which were members of the Group of 77 to give consideration to ways of strengthening and preserving the risk model in connection with acts not prohibited by international law.

75. Mr. YU (Republic of Korea), speaking on the topic of State responsibility, said that the distinction between crimes and delicts reflected a qualitative difference between ordinary delicts and basic infringements of the international public order. The concept of crime was rooted in positive law and in the realities of international life, which were generally manifested in the practice of States and the rulings of international tribunals. Egregious breaches of international law, such as aggression, genocide, apartheid or the infringement of basic human rights, were distinct from ordinary delicts and should therefore be treated separately.

76. On the issue of State responsibility for crimes, notwithstanding some technical difficulties, a concept equivalent to mens rea could be envisaged in the case of acts attributable to States. Recognition of the criminal responsibility of a legal person under certain conditions and circumstances was evidenced by recent developments in some national legal systems. The Commission should therefore examine the possible consequences of the determination of a State crime at both the substantive and instrumental levels and establish a special regime for State crimes under its mandate to maintain a balance between the codification of international law and its progressive development.

77. With respect to the language of article 19, the current wording, though relatively satisfactory, was subject to modifications on second reading. His

delegation supported the use of the term "crimes", which stressed the exceptional seriousness of the breach concerned and might have a deterrent effect on the conduct of States.

78. The question of who would be responsible for determining that a crime had been committed and for implementing the applicable punitive measures was of fundamental importance in instituting a regime of international responsibility for crimes. At the theoretical level, it was more logical for an international judicial body which was impartial, independent and representative of the international community to make such a determination. In reality, however, owing to the current organizational structure of the international community and its lack of compulsory jurisdiction, there was no alternative but to assign that task to individual States, including injured States. His delegation did not share the view that various United Nations organs, such as the Security Council and the General Assembly, would be competent to deal with the international crimes of States. Given their inherently political nature and the need for numerous institutional revisions, none of those organs could serve as a valid legal instrument.

79. At the same time, his delegation strongly objected to the notion of leaving room for the unilateral initiatives of States or groups of States to determine the existence of State crime and the appropriate reaction. Even though the international community was unlikely to have proper mechanisms at its disposal in the near future, the Commission should continue to seek ways of obtaining an adequately representative organ with an effective judicial verification system for determining the legitimacy of the characterization of the crime and reaction.

80. His delegation shared in part the concerns expressed by the Commission that the recognition of the criminal responsibility of a State might cast an undeservedly dark shadow over the entire population of that State and result in collective punishment. Indeed, punitive measures taken against the lawbreaking State could easily affect innocent people, even those who had been opposed to the crime. Any penalties which might have particularly severe effects on the people as a whole should therefore be avoided. Sanctions carried out against the State should be permissible only if implemented in accordance with strict procedures and with due consideration for the rights of the innocent. Finally, his delegation urged the Commission to identify notable differences in the consequences of an international crime and an ordinary delict, bearing in mind that progress in that field might promote the rule of law in international relations and uphold common international interests.

81. Mr. CHATURVEDI (India), Vice-Chairman, took the Chair.

82. Ms. LINEHAN (Australia), referring to chapter IV of document A/49/10, said that the debate over the notion of criminal behaviour within the context of State responsibility, and the distinction between an international delict and an international crime, clearly raised basic questions about how relations between States should be regulated. Moreover, difficult questions also rose in the context of considering the consequences of an international crime - an issue which had not yet been fully addressed by the Commission. Her delegation was of

the view that the development of the concept of an international crime must be given substantial consideration by States before further work in that area was done by the Commission.

83. On the other hand, her delegation believed that the Commission's work relating to the procedures for the adoption of countermeasures had the potential to promote the peaceful settlement of disputes. Accordingly, it would be more fruitful for the Commission to focus on finalizing a text on that subject which could attract wide support and lead to the drafting of a convention within the current term of the Commission's members.

84. Australia noted the progress made towards completion of the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law (A/49/10, chap. V). However, as the most important part of that topic remained the question of liability, her delegation noted with satisfaction that the tenth report of the Special Rapporteur (A/CN.4/459) dealt with that issue and made concrete proposals in that regard.

85. The issue of liability was closely linked to the substantive obligations imposed on States, including, in particular, article 14 of the draft articles. Moreover, in the consideration of that issue, the draft articles on the non-navigational uses of international watercourses (A/49/10, chap. III), particularly article 7 thereof, should not be ignored.

86. Australia had consistently argued that Principle 21 of the Stockholm Declaration reflected a customary-law obligation on the part of States to take action to ensure that their activities did not cause environmental damage beyond their territory. That obligation was not restricted by such phrases as "take appropriate measures" or "take practical measures".

87. However, the Commission argued that the obligation to prevent transboundary harm was not in fact an obligation of result - in other words, an obligation to prevent harm - but merely an obligation to attempt to prevent harm in accordance with a standard of due diligence. While that might generally be the case in relation to measures of prevention, due diligence might not always be the relevant standard. In the case of treaty regimes, it was always necessary to examine the actual content of the obligations assumed by States, which were sometimes obligations of result.

88. While draft article 14 dealt with the need to take appropriate measures to prevent the risk of transboundary harm, the situation when harm actually occurred was unclear. It was not sufficient to provide that while action could be taken against a private operator, the State of that operator was liable only if a breach of a due diligence obligation had occurred. That was a situation in which there was a wrongful act by a State contrary to an explicit obligation for which the consequences of a breach were clearly established by international law, as reflected in draft article A.

89. In the case of a lawful act by a private operator which caused transboundary harm, private-law remedies against the private operator were insufficient. That was the issue which the Commission would need to consider at

its next session. The Special Rapporteur had provided for alternative drafts dealing with State liability in that situation - versions A and B of article 21.

90. Australia did not accept the Special Rapporteur's conclusion in document A/CN.4/459 that it would be simplest not to impose any form of strict liability on the State. Simplicity was not the relevant criterion; justice for those injured was the proper object of a liability regime.

91. The Special Rapporteur offered four options for dealing with State liability. At minimum, her country considered that strict liability should be imposed on the State subsidiary to the liability of the operator or as residual liability. It was unacceptable in the case of an activity which caused transboundary harm that the innocent victims in one State could be left without compensation because a private operator in the State in which the harm originated did not have adequate financial resources to meet the costs of compensation for the harm. It was for that reason that Australia considered residual State liability to be essential and strongly supported alternative A.

92. In that connection, Australia noted with disappointment and concern the significant weakening of article 7 of the draft articles on the non-navigational uses of international watercourses (A/49/10, chap. III). Apart from emphasizing the limited nature of the due diligence obligation to utilize watercourses in such a way as not to cause significant harm, the articles provided that if harm occurred, there was only an obligation to consult.

93. Whatever the justification for that limited obligation in the case of watercourses, the same standard was certainly not applicable to activities which had a known risk of causing significant transboundary harm through their physical consequences. The Commission should bear that in mind in its future work on injurious consequences and in determining the legal consequences for States when prevention did not work and harm actually occurred.

94. Turning to chapter V of document A/49/10, she welcomed the definition in draft article 2 provisionally adopted by the Commission of the expression "risk of causing significant transboundary harm". Australia believed it was important that, as indicated in the commentary, "significant" should be understood as more than detectable but not necessarily substantial or serious.

95. Australia also welcomed the inclusion of draft articles 12, 13, 15, 18, 19 and 20. Article 18, paragraph 3, provided that, if consultations failed, a State none the less had an obligation to take into account the interests of States likely to be affected and could proceed with the activity, but at its own risk. That wording made it clear that a State could not ignore known concerns and possible consequences and claim, when damage occurred, that it had done all that due diligence required.

96. Australia endorsed the Commission's recommendation that the draft articles should take the form of a convention. A legal instrument would establish an institutional framework for determining when it was necessary to cooperate at an international level and what regional watercourse management regimes should do.

97. While the principles adopted in the draft articles were generally applicable to the varied range of watercourses which might be affected and to confined transboundary groundwaters, keeping the draft articles focused on international watercourses would avoid confusion. It was therefore appropriate to treat confined transboundary groundwaters separately.

98. Her delegation supported the convening of a diplomatic conference to draw up a convention based on the draft articles in preference to submission of the text directly to the General Assembly for adoption. Australia also endorsed the Commission's recommendation that the proposed resolution on transboundary groundwaters should be adopted.

99. Her delegation believed that the principles of international law relating to reservations required further clarification. It also believed that the future work of the Commission on the topic of State succession and its impact on the nationality of natural and legal persons could be of great value to States.

100. Mr. KALITA (India), speaking on the law of the non-navigational uses of international watercourses, said that, after two decades of work by the Commission, there were several options as to the future of course of action. The first was for the United Nations to convene a diplomatic conference to adopt the draft articles finalized by the Commission. Secondly, the draft articles could be reviewed by a working group of the Sixth Committee. The third option was for the General Assembly to accept the draft articles by a resolution and then open them for signature by States parties. India preferred the third course of action.

101. One of the major issues arising from the draft articles was the definition of the scope of the proposed convention. Over the years, there had been considerable debate within the Commission on whether the draft articles should deal only with surface waters or, in addition, with groundwaters both related and unrelated to the surface waters and other types of bodies of water connected to the watercourse. It had finally been decided that, while the question of groundwaters unrelated to the surface waters of the watercourse required further study, some of the general principles laid down in the draft articles could usefully be applied by States in regulating and sharing among themselves even such bodies of unregulated groundwaters.

102. The question of when and under what circumstances a State was obliged to consult and, if necessary, negotiate with other States in respect of the utilization of that portion of the watercourse that lay within its territory had also given rise to extensive discussion. In practice, that issue often created difficulties among States.

103. The definition of the relationship between watercourse States adopted in article 2 did not explain the concept of an "international watercourse" except to state that "a 'watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". The use of the word "system" was intended, however, to cover a number of different components of the hydrological system through which water flowed, including rivers, lakes, aquifers, glaciers,

reservoirs and canals. So long as those components were interrelated, they formed part of the watercourse by virtue of being a unitary whole. The definition in article 2 (b) also referred to "flowing into a common terminus" as another criterion for determining an international watercourse. Again, that criterion was essentially included to delimit the scope of the draft articles and thus to limit the legal relationship between two or more watercourse States. That criterion had been slightly modified on second reading with the addition of the word "normally" in response to the submission that some rivers divided themselves into surface and groundwaters before reaching the sea and therefore might not be regarded as having met the criterion of "flowing into a common terminus". By including the word "normally", the Commission had made it clear that the burden of proof lay upon States which wanted to apply the current draft articles to regulate rivers not flowing into a common terminus on the ground that there existed a physical relationship and a unitary whole for the major part of the length of the watercourse.

104. Another important issue was the relationship between draft articles 5 and 7. In article 5, the Commission sought to reconcile the concept of equitable and reasonable utilization and participation with the obligation not to cause significant harm noted under article 7. The Commission proposed that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm. However, if significant harm was none the less caused to another State, in the absence of an agreement, the States concerned should consult with each other over the extent to which such utilization was equitable and reasonable.

105. The Commission's approach was based on three conclusions. First, that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; secondly, that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; and thirdly, that the fact that an activity involved significant harm would not of itself necessarily constitute a basis for barring it. In other words, in certain circumstances, "equitable and reasonable utilization" of an international watercourse might still involve significant harm to another watercourse State. In such instances, the principle of equitable and reasonable utilization remained the guiding criterion in balancing the interests at stake. For those who preferred not to subordinate the principle of equitable and reasonable use to the concept of avoidance of adverse harm, the compromise achieved was less than satisfactory, but could be accepted in the interest of consensus.

106. With regard to the principle of non-discrimination, article 32 provided that, unless the watercourse States concerned had agreed otherwise, a watercourse State was obliged not to discriminate on the basis of nationality or residence or place where the injury had occurred, in granting to a person access to judicial procedures, or a right to claim compensation or other relief in respect of significant harm caused by activities carried on under its jurisdiction. A view had been strongly advocated that such a principle of non-discrimination in favour of foreign nationals had no place in the proposed convention, even if there was some justification for redressing injury to foreign nationals, since the draft articles essentially concerned the relationship between co-riparian States. Moreover, where planned measures were

involved for the development of a State, any priorities concerning the utilization of its natural resources should be confined to matters of policy and the interests of the nationals of that State.

107. It had been argued in defence of article 32 that it contained nothing but a general provision and that foreign nationals would not be entitled to anything more than what was provided in the law of the State concerned. Such a right of access in favour of foreign nationals would arise only if there was no agreement between the watercourse States concerned on the matter of protection of the interests of persons, natural or juridical, who had suffered or were under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse. Despite those clarifications, his delegation was still of the view that article 32 did not have a proper place within the structure of the proposed convention.

108. Turning to the final major issue, namely, the settlement of disputes, article 33 promoted the settlement of disputes keeping in view the choice of means of such settlement and the need for mutual agreement before any one of the options could come into play. The Commission had attempted to insert in the article, however, a rule for a compulsory fact-finding commission comprising three members. That provision reflected the need for a comprehensive and compulsory dispute settlement procedure. Such an arrangement, however, required greater discussion and elaboration, even though the essence was that disputes should be resolved peacefully and by mutual agreement.

109. On the whole, the draft articles were generally acceptable and had accommodated the different perspectives of the States and authorities on the subject. The balance of interests thus achieved could be supported in the interest of consensus. His delegation hoped that no fresh attempt would be made to reopen the delicate balance of interests, since any such effort would involve a long and avoidable process of further contention among States without the prospect of achieving any greater success than that which the Commission had already achieved.

The meeting rose at 1.15 p.m.

UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
27th meeting
held on
Friday, 4 November 1994
at 10 a.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. CHATURVEDI (India)
(Vice-Chairman

CONTENTS

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/49/SR.27
21 November 1994

ORIGINAL: ENGLISH

94-82037 (E)

In the absence of Mr. Lamptey (Ghana), Mr. Chaturvedi (India), Vice-Chairman, took the Chair.

The meeting was called to order at 10.40 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10, A/49/355; A/C.6/49/L.5)

1. Mr. DE SARAM (Sri Lanka) said that in elaborating the draft articles on State responsibility, the International Law Commission was proposing new rules of international law with regard to State "crimes" (article 19 of part one) and countermeasures. The Commission had discussed at length the question of whether a State, as distinct from those individuals governing it, could properly be said to have committed a crime. A substantial number of members were now convinced that the use of the term "crime" in article 19 was imprecise and inappropriate. Furthermore, it was felt by many that the purpose of article 19 was not to establish a distinction between crimes and delicts but rather to establish a distinction between the consequences that should arise from the infringement by a State of a jus cogens obligation and the consequences that should arise from breaches of lesser international obligations. Even if article 19 succeeded in making such a distinction, several real and substantial reservations to the article remained. First, there was thus far no satisfactory or comprehensive definition of what constituted jus cogens obligations. Secondly, the draft articles did not specify which body would determine whether a jus cogens obligation had in fact been violated. That function could not properly be exercised by either the General Assembly or the Security Council, since neither was a judicial body. Nor was the International Court of Justice a good choice because its jurisdiction was only partial and not uniform.

2. Another important issue was whether the draft articles on State responsibility should deal with the notion of punishment. In his view, the primary purpose of the articles was to restore the status quo ante, by restitution or by pecuniary compensation, in the event of a breach of an international obligation by a State. To incorporate into the draft the concept of punishment of that State would create a serious anomaly which would substantially reduce the acceptability of the draft. In his view, the draft articles should make reference neither to punishment nor to the concept of moral outrage.

3. Turning to the question of countermeasures, he pointed out that while "taking the law into one's own hands" was unacceptable under national legal systems, it was considered necessary in relations between States because of the absence of effective procedures to ensure that States respected their obligations to one another. The Commission was currently elaborating rules on the manner in which States could exercise their right to take countermeasures. Judicial or arbitral guidance in that respect was sparse and, as a result, the Commission was engaged in the progressive development of the law.

4. Most members of the Commission agreed on the following: countermeasures must be proportional to the perceived wrong; some forms of countermeasures were unacceptable in contemporary international law and should be prohibited; and uninvolved third States should not be the target of countermeasures.

5. However, other more difficult issues had yet to be resolved. In particular, the Commission had not examined as thoroughly as it should have the question raised in draft article 11, paragraph 1, and in article 12 of what preliminary steps should be required of an injured State before it could have recourse to countermeasures. One view in that regard was that it was up to the injured State to decide, based on the facts of the case, whether it should take any steps prior to countermeasures; errors could be considered after the countermeasure had been implemented. Others took the view that it was inadvisable, because of the possibilities of abuse, to grant wide discretionary powers to the State which would be taking the countermeasures. It was evident that inequalities between States would give one State the advantage in the exercise of countermeasures.

6. Preliminary steps to be taken prior to resort to countermeasures should be the following: notification by one State to another that the latter State appeared to be in breach of an obligation; notification by one State to another that unless the latter State took steps to repair that breach, countermeasures might be used; and request by the notifying State that differences between the two States be resolved through dispute settlement procedures. Because the time involved in taking preliminary steps might work to the disadvantage of the notifying State, provisions should be made for measures to preserve the position of that State during that period.

7. The articles on countermeasures should incorporate certain general principles which would be applicable in all possible circumstances: prior to the use of countermeasures, the wrongdoing State should be clearly informed that it was in breach of an international obligation; and disputes arising from the taking of countermeasures should be resolved by binding dispute settlement procedures, which could be invoked by any party involved. At the same time, the articles must be balanced and must give due consideration to the fact that various scenarios were likely to arise in connection with countermeasures. In one scenario, a State which had committed an internationally wrongful act could be recalcitrant and unresponsive. In another scenario, there could be misunderstandings in good faith between the two States involved. It was possible, too, that the injured State might be in error with regard to the applicable law.

8. Turning to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he endorsed the Commission's decision, taken in July 1992, to continue with its working hypothesis that the topic dealt with "activities" rather than "acts" and to defer any formal change of the title because additional amendments to it might be made in the future. It was clear that in its work on the topic, the Commission was dealing with something more than what was usually understood by the term international liability, namely, the liability of one State to another.

9. He welcomed the draft articles on the topic which dealt with prevention. However, it was difficult to be too hopeful with regard to the next phase of the Commission's work on so-called remedial measures. In the first place, the term "remedial measures" was an unfortunate turn of phrase. It could imply that what was to be considered was only the question of compensation for harm sustained in cases where a preventive measure was not taken. Such an approach would be inadequate, as it would not take into account what should be done, whether by enlargement of the traditional rules governing compensation to be paid by a State for damage attributable to it or through other modalities, to compensate those who had suffered substantial transboundary harm in cases where it was impossible to establish whether there had or had not been any fault in a particular case.

10. The traditional rules governing State responsibility provided for compensation in only two types of cases: (a) where transboundary harm was caused by fault attributable to the State of origin; or (b) where such a State had earlier agreed that compensation would be provided purely on a showing that an activity in its territory caused transboundary harm, regardless of whether or not it was a case of fault. However, the Commission had so far been unable to agree on the fundamental questions as to whether it was possible to conclude that compensation would be obligatory in at least some cases of transboundary harm, even where fault could not be proved, or whether a general rule to that effect should be codified in international law. He agreed with Australia that both those questions should be answered in the affirmative; nevertheless, there was no consensus in the Commission on those issues.

11. The Commission should give consideration to what its future objectives should be before the Drafting Committee became involved in the elaboration of specific texts. Such a review would be possible only if the Commission was fully informed of recent developments in the field of international environmental law, including: (a) the relevant provisions of treaties relating to transboundary harm and the various compensation procedures proposed therein; (b) national statutory enactments in a number of countries, requiring that compensation should be provided regardless of a showing of fault and setting out compensation procedures, and the amendments proposed to such legislation in the light of experience; and (c) studies carried out by intergovernmental organizations of the best means of providing compensation for environmental harm. In that connection, he drew attention to a survey of State practice and national legislation undertaken in the 1980s at the Commission's request by an expert in the United Nations Office of Legal Affairs. Similar studies in some of the areas to which he had referred would be of great benefit to the Commission's work.

12. Mr. LAMAMRA (Algeria) noted that under chapter IV on the subject of State responsibility, the Commission had devoted most of its efforts to a consideration of the concept of State crime as expressed in article 19 of part one of the draft articles, and the implications that would follow from it. His delegation shared the opinion of the majority of the members of the Commission that the distinction between crimes and delicts as embodied in draft article 19 was valid and that the concept of State crime rested on solid legal and

political foundations. Crimes and delicts both involved wrongful acts committed by a State, but the nature and seriousness of those acts might and indeed often did vary. Therefore, a hierarchy of such wrongful acts should be established.

13. While at first glance, it seemed that the concept of the criminal responsibility of a State did not exist in international law, closer examination revealed indications that justified the present wording of draft article 19. First of all, crime was not a concept exclusive to internal law. It could also be found in international law, as exemplified in the Convention of 1948 on the Prevention and Punishment of the Crime of Genocide and the draft Code of Crimes against the Peace and Security of Mankind. Furthermore, international law recognized violations so serious that they could without hesitation be called crimes, such as aggression, slavery, apartheid and violations of fundamental human rights. Citing those examples called to mind the principle of jus cogens, despite legal uncertainties about the exact definition and scope of the term. Moreover, there was a similar imprecision in the definition of "international custom" and of the "general principles of law recognized by civilized nations" referred to in article 38 of the Statute of the International Court of Justice. The problems the Commission encountered with the concept of jus cogens when preparing the Convention on the Law of Treaties should spur it on to tackle the issue again and master it during its work on the draft articles on State responsibility. He felt that it was time to realize the potential offered by the concept of jus cogens and to give it precision and substance. Codification of the concept, impossible in 1969, could now contribute greatly to the enrichment of international law.

14. The Charter of the United Nations spelled out a number of fundamental principles the violation of which by a State was indisputably equivalent to the perpetration of a crime, among them the use of force in international relations and violation of the right to self-determination. None the less, defining the practical mechanisms for calling States to account for criminal acts was difficult and complicated because of its political implications and the absence of procedures and organs for prosecuting a State on such grounds. His delegation was opposed to giving the Security Council the power to act in the matter. Such a solution would in effect confer judicial powers on a highly political organ. It would constitute a serious setback to the principle of the sovereign equality of States as set forth in the Charter, since the permanent members of the Security Council, through their veto, would have permanent immunity even if they committed criminal acts. Such a solution would also result in a confusion of powers and would seriously imbalance the institutional architecture of the United Nations. His delegation encouraged the Commission to pursue its consideration of the recognition of competence to determine the existence of a crime and to attribute it to the only international organ fully representative of the international community, namely, the General Assembly of the United Nations. Another idea of merit was to attribute jurisdiction to the International Court of Justice in such cases. He was confident that the Commission would present more fully developed suggestions on the topic of State responsibility at the next session.

15. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, Algeria would like to see the specific situation of developing countries given proper consideration. His delegation was pleased to see that the articles provisionally adopted by the Commission at its forty-sixth session reflected the interdependence between economics and ecology, in particular the transboundary environmental implications of some economic activities. It also concurred in the recognition that the principles of international law created obligations on the part of States whose activities caused damage to the environment in other States or in areas outside the boundaries of national territories and therefore of interest and concern to humanity as a whole.

16. Mrs. FLORES (Uruguay), speaking on the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles said that her delegation considered the distinction between international crimes and international delicts to be significant. Paragraph 2 of draft article 19 defined an international crime as "a breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". International delicts formed a much broader category consisting of less serious offences. From the definition one could deduce the three criteria to be applied in defining crime: first, a breach involving fundamental interests of the international community and going beyond the scope of bilateral relations; second, a breach that was serious in both quantitative and qualitative terms; and, third, recognition that the breach was a crime, a concept too subjective by itself and requiring further definition in the list contained in paragraph 3 of the article.

17. The two categories of wrongful acts would be subject to different regimes. In the case of international crimes, the breach of an obligation would authorize even parties other than the injured State to bring a complaint, whereas in the case of international delicts, only the State whose legal interests had been directly affected was authorized to bring a complaint against the State that had committed the internationally wrongful act. The distinction was understandable, because the first category dealt with violations that affected the very foundations of international society. The International Court of Justice drew a distinction between obligations that States owed to the international community as a whole and those that they owed to another State in the field of diplomatic protection. In the first instance, given the importance of the rights in question, all States could be deemed to have a legal interest in seeing those rights protected; therefore, such obligations were erga omnes. A crime and a violation erga omnes were not synonymous terms. While every international crime constituted a violation of an erga omnes obligation the contrary did not hold, since ordinary crimes, such as the infringement by a coastal State of the right of transit passage through an international strait, although they involved an erga omnes obligation, did not constitute an international crime.

18. Some who questioned the concept of State crime argued that it did not exist in lex lata, because there was no instrument making it an obligation for States to accept it, and they did not consider applicable the jus cogens provisions in

the 1969 Vienna Convention on the Law of Treaties, for two reasons: first, because an invalid treaty concluded against jus cogens was not necessarily to be considered a crime and, second, because the inclusion of the concept of jus cogens in the 1979 Convention had been conditional on acceptance of the jurisdiction of the International Court of Justice.

19. Her delegation shared the opinion that the two concepts were not identical but parallel. The category of international obligations that would nullify any treaty to the contrary was broader than the category of obligations the violation of which constituted an international crime. The establishment of the two categories of crime and delict altered the traditional view linking the wrongful act to compensation and limiting the consequences of a breach of international law to a bilateral relationship between the State committing the wrongful act and the injured State. It introduced a punitive implication. In addition to compensation, penalties might be imposed on the perpetrating State. In the Commission's language, the term "penalty" referred to a measure which while not involving the use of force was intended to inflict a punishment.

20. Under article 19, when a crime was committed, any member of the international community had the right to call for an end to the violation. In the case of international delicts, on the other hand, States not directly affected could not call for the cessation of the wrongful act. The chief point which her delegation would like to make was that there were no problems from a legal standpoint in recognizing the distinction between crimes and delicts. Such a distinction was supported both by precedent and by international instruments referring to international crimes.

21. The subject of the countermeasures entailed a number of problems, including the minimal input that internal law could provide and the absence of an effective centralized system for implementing the law at the international level. Some members of the Commission had suggested that countermeasures were incompatible with modern international law and that the topic should be approached from a new perspective. Her delegation wished to reaffirm all the arguments of fact and law it had presented two years earlier in the Commission to demonstrate that countermeasures should not be included in the draft articles, although the majority opinion on the Commission had been in favour of including the subject in the draft articles on State responsibility. Her delegation felt that the countermeasures were wrongful acts in themselves and that their wrongfulness was not obviated by the fact that they were a response to a previous wrongful act.

22. The Commission had provisionally adopted articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures) for inclusion in part two of the draft articles. Her delegation felt that even in the revised version of article 11 the injured State continued to be both judge and party, since it determined whether a wrongful act had been committed and whether the other conditions justifying countermeasures had been met. Determining whether those conditions had been met could be the source of new disputes giving rise to new wrongful acts. Nor could the possibility be ruled out that there had not originally been a wrongful act and that a State claiming

to be the victim of such an act and taking countermeasures would itself have committed a doubly wrongful act.

23. In conclusion, while acknowledging the merit in the argument that the countermeasures might serve a useful function given the current political climate in the international community, in principle her delegation did not believe that the answer to the consequences of a wrongful act was to respond with another wrongful act, particularly if there were other means of achieving the same ends. She wished to stress the importance of developing an adequate system for peaceful resolution of disputes. In addition, her delegation felt that it was essential that a third party should determine such matters as whether a wrongful act had in fact been committed, what measures were appropriate to take and whether they were proportional.

24. Turning to chapter V of document A/49/10, she noted with satisfaction that her delegation's views had been taken into account by the Special Rapporteur both in the general approach to the topic and in some specific aspects. The special nature of the topic under consideration resided in the fact that depending on the approach taken at the outset, varying conclusions might result. There was a difference between stating that transboundary harm was caused by a wrongful act and stating that the obligation to make reparation would arise only if absolute liability had been provided for.

25. With regard to prevention ex post, her delegation believed that it was essential to consider the measures to be adopted after the occurrence of an accident to prevent or minimize its transboundary harmful effects. Such measures should be included in the draft and should be compulsory for the State of origin even if the damage was caused by the activities of an individual.

26. Mr. HALFF (Netherlands), referring to chapter V of the report (A/49/10), said that while the Commission's decision to limit the scope of the topic to activities involving transboundary harm was commendable in principle, further restriction of the topic to activities involving only a risk of causing transboundary harm was questionable. It was clear that the Commission still intended to deal with all aspects of activities not prohibited by international law which entailed a risk of causing significant transboundary harm - in other words, not only remedial measures, but also preventive measures and related cooperation, matters which were not usually covered by the notion of liability.

27. The title of the chapter had in fact become a misnomer for several reasons. First, it referred to acts, while the scope of the draft articles provisionally adopted by the Commission included activities not prohibited by international law. Secondly, the title referred to liability, which did not normally relate to prevention of harmful acts, but to financial and other remedies for them. Thirdly, the title referred to injurious acts not prohibited by international law, which were not necessarily only acts involving a risk of causing transboundary harm but, under certain conditions, also acts actually causing such harm; nevertheless, the Commission had decided to deal with only the first category of acts. Fourthly, the title referred to acts not prohibited by international law, although it was clear from the articles provisionally adopted

by the Commission that not all such acts could be deemed not to be prohibited by international law.

28. What was really at stake in the topic under consideration was not "acts not prohibited by international law", since the injurious consequences of acts of that nature need not be prevented at all, but acts not prohibited or not unlawful per se under international law. In other words, the topic dealt with activities which, depending on the extraterritorial harmful effects which they might or did have and the circumstances under which they were carried out, could be either lawful or unlawful under current international law.

29. It should also be borne in mind that where the topic included the prevention and abatement of transboundary harmful effects related to the use of international watercourses, its subject-matter was already largely covered by the draft articles on the non-navigational uses of international watercourses. That in itself did not make the draft rules on liability meaningless, as such acts might also involve harmful activities not related to the non-navigational uses of international watercourses; however, care should be taken either to avoid obvious discrepancies between the two sets of draft articles, or to include clear provisions regarding the relationship between the two in case of conflict between them.

30. Subject to the preceding remarks, his delegation could, in general, support the approach taken by the Commission. The requirements of prior authorization, risk assessment, measures to prevent or minimize risk, non-transference of risk, notification and exchange of information were well-known components of modern international environmental law.

31. As the application of the articles depended on, inter alia, the existence of activities involving a risk of causing significant transboundary harm through their physical consequences, the determination of the existence of such a risk was of crucial importance. The Netherlands felt that the existence of such a risk should not be left to the unilateral determination of either the State of origin or the affected State.

32. The provision by each State concerned of information regarding activities, the risk involved and the harm which might result should not be limited, as it currently was in article 16 bis, to its own public, but to the public likely to be affected by an activity as referred to in article 1.

33. Under draft articles 18 and 20, the States concerned must enter into consultations based on an equitable balance of interests with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm. If the consultations failed to produce an agreed solution, the State of origin must nevertheless take into account the interests of States likely to be affected and could proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it might have under the articles adopted by the Commission or otherwise. In that connection, the question arose of how the obligation to attempt to achieve a solution based

on an equitable balance of interests related to the due diligence obligation embodied in draft article 24. He wondered whether it might be assumed that the obligation laid down in draft article 14 was the real substantive obligation imposed on the State of origin, an obligation from which the States concerned could deviate if they could reach an acceptable solution in accordance with draft articles 18 and 20, but which would continue to govern their mutual relations if such an acceptable solution could not be achieved.

34. With regard to draft article 20 (c), (e) and (f), which mentioned certain factors to be taken into account in achieving an equitable balance of interests, the Netherlands believed that the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment (paragraph (c)) should not be separated from factor (a), but should be an integral part thereof so as to ensure that damage to the environment was included in the notion of harm. Furthermore, it was unclear on what grounds a State of origin could justifiably subordinate its standard of protection of another State's environment to the standard of protection which that other State applied within its own territory. That was true not only if the harmful effects of activities remained within the other State, but especially if they were externalized to third States, for if one State caused harm to the environment, that should not provide an excuse for another State to do the same. With regard to the degree to which States likely to be affected were prepared to contribute to the cause of prevention, the question might be raised of how that factor could be reconciled with the polluter-pays principle.

35. Turning to the tenth report of the Special Rapporteur (A/CN.4/459), he said that his country supported the approach taken by the Special Rapporteur in respect of measures of prevention ex post or "response" measures. The Netherlands also supported the approach consisting of imposing primary and strict liability on the operator for the transboundary harm caused by his activities. In that connection, the Special Rapporteur should be guided by existing civil liability conventions or conventions dealing with similar matters. In order to enable the innocent victims of activities involving a risk of causing significant transboundary harm to receive full compensation for the harm sustained, consideration should be given to a system of subsidiary liability of the State of origin in order to cover that portion of the damage that was not reimbursed by the operator. Depending on the nature of the activity concerned, the establishment of a consortium of States or private operators to bear a subsidiary liability should also be considered.

36. Mrs. BELLIARD (France) said that the Commission's debate on article 19 of part one of the draft articles had been imaginative, subtle and bold. Her tribute to the Commission was all the more sincere since her delegation had constantly pointed out that the question raised very delicate political problems and that the need or the legal value of addressing the issue was questionable. She reiterated France's position that the formulation of article 19 was premature in terms of the Commission's work on State responsibility and of the actual development of international law. Indeed, it was clear from the report that the article had met with serious reservations within the Commission itself.

37. The quality of the Special Rapporteur's report and the level of debate was such that they merited a further explanation of why her delegation was opposed to article 19 and its underlying assumptions. The first - and the most serious - was the assumption of the existence of a category of internationally wrongful acts that were precisely analogous to the crimes and delicts covered by national criminal legislation. The fragility of that assumption was clear from the difficulty experienced by the drafters of the article in defining such presumed crimes and delicts with the precision required by criminal law. Thus the article seemed to be based on the idea that all wrongful acts attributable to a State would fall within the scope of an international criminal law applicable to States. That, however, overlooked the fact that a wrongful act, however serious, was not necessarily a crime. All national legislations characterized the failure to honour agreements as a civil fault, not a criminal one. Moreover, the article stressed the seriousness of the wrongful act. Although some violations of international law were particularly serious, it did not follow that such violations committed by States could be subject to a "criminal law". Even supposing that such a law existed, it would run counter to the principle of nullum crimen, nulla poena sine lege. Crimes could not be defined if the criteria for them were not properly defined. That objection could not be sidestepped by referring to the "international community", which had a political reality, but legally was an indeterminate entity. The article invited a host of subjective judgements, such as the exact definition of "international obligation" and its "essential" nature "for the protection of fundamental interests of the international community". Who would determine whether an interest was "fundamental" and that it affected the "international community", of which the article gave no legal definition? Were the interests of all existing States involved or only those of a large number of States? If so, which?

38. The Commission must already in 1976 have been conscious of the considerable uncertainty surrounding its definition, since it had given examples in paragraph 3 of various wrongful acts which could be termed international crimes. By so doing it had departed from its own principle of restricting itself to secondary rules and not to concern itself with primary rules. Moreover, the paragraph reflected some confusion. It dealt with government policies which were justly criticized by a large majority of States, but which were the product of political orientations reflecting the ideological concepts of a particular period of history rather than acts clearly identifiable as criminal under any jurisdiction. Indeed, it contained such acts as transboundary pollution which not all national legislations had yet criminalized. Nothing could disguise the totally subjective nature of article 19, not even the concept of the erga omnes violation of a general principle of international law. Even if such a concept existed in international law it might well be insufficient to determine on its own an international public policy the violation of which would make a State subject to criminal sanctions.

39. Some members of the Commission had suggested that international crime could be defined as a violation of jus cogens. In her delegation's view such a vague and debatable concept provided no way out of the impasse. France was opposed to it, not only because the concept was ill-defined but because the authors of the

Vienna Convention on the Law of Treaties, to which France was not a party, had drawn from it conclusions which introduced uncertainty into international law. To attempt to define a crime according to the rules of jus cogens, on which the best minds could not agree as to its nature, content or even existence, was a risky undertaking. Moreover, even the concept of jus cogens would not provide a solution to the problem, since violations of such a law would not necessarily be serious enough to qualify as State "crimes", even if the concept was admitted.

40. Putting her delegation's point of view in a more positive way, she said that, as some members of the Commission had pointed out, State responsibility was neither criminal nor civil, but sui generis: international, different and specific. It would be misleading to impose on it mechanically the concepts of national law, particularly criminal law. Moreover, criminal justice presupposed moral and social awareness in a human community. It also presupposed a legislator empowered to define and punish crimes, a judicial system to try them, and forces of law and order to enforce the punishments handed down by a court. No such bodies existed at the international level. Universal values, though they undoubtedly existed, were too imprecise to carry the weight imposed on them by article 19.

41. Her delegation's second objection on principle to the contents of article 19 concerned the question of whether a crime could be attributed to a State. The Commission had so far wisely restricted itself to crimes that could be attributed to individuals, though even that was a difficult task. One area of difficulty was the criminal responsibility of juridical persons, a concept which had been the subject of much controversy and was dealt with by States in various ways. The new criminal code in France excluded the State from such responsibility; the State alone was entitled to punish and therefore could not punish itself.

42. By extension it was hard to see who, in an international community of over 180 sovereign States, all with the power to punish, could exercise such power over other sovereign States. Although chapter VII of the Charter gave the Security Council powers to maintain or restore peace, it gave it no legal or criminal function with regard to States.

43. Another problem lay in the confusion in article 19 between the two concepts embodied in the word "State". One meaning of the word was the various bodies, such as administrations, governments or even political parties, whose members or leaders could be held responsible for criminal acts. According to the second meaning, under international law, the State was a more abstract legal entity comprising a territory, a population and institutions; in legal terms it was neither good nor bad, just nor unjust, innocent nor guilty.

44. In those circumstances her delegation regretted that the majority of the Commission seemed to be intent on continuing down the same path, at least at its next session, and pursuing its consideration of the specific consequences of acts qualified as crimes under the article. Not only was its decision attended with considerable difficulties, but, as the representative of France had said the previous year, in persevering with article 19 the Commission would step out

of the role assigned to it, and to no purpose, since even if its conclusions were approved by some States in the form of a convention, such a convention would not affect the competence of United Nations organs as defined by the Charter.

45. She believed that article 19, conceived in the 1970s, debated and contested as early as 1976, had no place in the modern world. It had lost the usefulness intended by its authors owing to the developing role of the United Nations: the Security Council was managing, despite difficulties, to carry out the responsibilities imposed on it by member States. Moreover, the Council had rightly decided that intolerable violations of a people's rights by its own Government could constitute a threat to peace and international security, with the result that those guilty of exceptionally serious internationally wrongful acts, as envisaged in article 19, were subject to prompt and appropriate action. In addition, the Council had implemented a wide range of measures with varying aims, including prevention, dissuasion, coercion or encouragement. They might seek to prevent repetition or to provide reparation. They were not of a punitive character, even though they were often characterized as sanctions. Lastly, the Council had established an international tribunal competent to try crimes in the former Yugoslavia and envisaged the same formula for Rwanda. Such an innovative and pragmatic approach was more appropriate than the solution adopted in article 19. In other words, the article was either premature or out of date. It should be dropped from the draft articles under discussion in the Commission.

46. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, she offered some comments on the new draft articles presented by the Special Rapporteur in his tenth report (A/CN.4/459). With regard to prevention ex post, her delegation believed that the Special Rapporteur's suggested phrase, "response measures", was the most logical and the most telling. She agreed that response measures could not be concerned with reparation, but she was less sure that they should be used for measures of prevention, since they could be taken only after the occurrence of an accident. They were neither strictly preventive nor did they belong in the sphere of reparation; they were simply specific emergency action. The new paragraph (e) therefore seemed apt, although there could be some discussion of the relative merits of "appropriate measures" and "reasonable measures", to ensure that the phrase could be interpreted as referring to measures to limit both the seriousness and the extent of transboundary harm.

47. With regard to the relationship between State liability and civil liability, she agreed with the Special Rapporteur's conclusion that State responsibility was normally subsidiary to that of the operator. The possibility of setting up insurance systems should also be considered in a positive spirit. As for other points raised in the report, she believed that the operator should mean the entity - whether a company, group or other person - holding effective responsibility for the general direction of the enterprise and final responsibility for any failures of safety. The rules for a competent court were

satisfactory, in that they corresponded to the generally accepted principles of private international law.

48. She pointed out that to make the State bear absolute liability for harm caused by lawful actions, if only residually for that not borne by the operator, would involve a significant development of international law. It was not clear that States would accept such a change, even though they had accepted some specific instruments such as the Convention on International Liability for Damage Caused by Space Objects. In that case, however, it was specified that space activity was restricted to States alone, which was not necessarily so in all the activities to which the draft articles might apply. That being so, she recommended that, without prejudging the final form of the draft articles, it would be useful to draw up a list of principles - if necessary with variants - to which States could refer when setting up specific liability systems. Without being binding, such a list would help to harmonize international responsibility for the injurious consequences of lawful acts, but at the same time leave scope for diversity.

49. Mr. GAWLEY (Ireland), speaking on the topic of international liability, welcomed the Commission's view that further work needed to be done to determine with greater precision what types of activity fell within the scope of the draft articles. It was also important to continue its work on article 2 in order to define with greater precision the terms used in the draft articles.

50. Having focused its efforts on the central issue of prevention, the Commission had seemed disinclined to consider another equally central issue, namely, liability for hazardous activity. Some delegations believed that the Commission should deal only with prevention, and should abandon any attempt to deal with liability, on the grounds that the matter was simple and that general rules of international law applied. Ireland believed that such a view was wrong. To begin with, it was illogical: for if general rules of international law applied, then it ought to be possible to state those rules. Secondly, the early history of the Commission's work had shown the value of fleshing out areas of law initially thought to be relatively straightforward: diplomatic relations, the law of treaties and the law of the sea were examples of areas in which the law had been clarified and developed. The Commission, and the international community, ought not to miss that unique opportunity to clarify, and where necessary progressively develop, the law regarding so central an issue as liability.

51. Mr. MOESI (Botswana) welcomed the adoption by the Commission of a draft statute for an international criminal court. Botswana fully supported the establishment of such a court, and did not question the need for international cooperation measures to complement traditional criminal justice systems based on national sovereignty. His delegation noted with satisfaction that the court was to be established, not by resolution of a United Nations organ, but by treaty, and that an "opting-in" system would be adopted with regard to acceptance of the court's jurisdiction.

52. In his delegation's view, the fact that access to the court was limited to the State party impeded the achievement of the objective of bringing those who committed international crimes to justice. Juridical persons other than the State party should also be afforded access to the court. It should be borne in mind that the victims of international crimes might be individuals. Were those individuals to have no recourse to the court? If it was felt that such a provision would cause more problems than it would solve, then that view should be clearly stated. Furthermore, article 26, paragraph 5, conflicted with article 27, paragraph 2 (b), for the former suggested that the final decision whether to prosecute lay with the prosecutor, whereas the latter suggested that the final decision lay with the presidency. Article 26, paragraph 5, also failed to specify what would happen if the prosecutor declined to prosecute even after being asked by the presidency to reconsider his decision. The draft required improvement in that regard.

53. His delegation wondered whether the omission of any reference to the qualifications of a defence counsel had been deliberate. Article 41, paragraph 1 (d), also gave the impression that any person of the accused's choosing might conduct his defence. There were many reasons why that state of affairs would be undesirable. No less important was the need to ensure that all officers of the court were subject to the same ethical rules, and that the judge, the prosecutor and the defence counsel were all ministers of justice.

54. His delegation welcomed the provisions of article 47, on applicable penalties, which could, however, be further improved by the addition of a provision requiring the person convicted to compensate the victim whether or not a fine had been imposed. Provision should also be made for forfeiture orders and seizure in respect of the proceeds and profits from the crime, which could then be used for purposes such as compensation. Finally, his delegation supported the view that further in-depth study of the draft Statute was needed before a conference of plenipotentiaries was convened.

55. Mr. TOMKA (Slovakia) said that his delegation shared the view that an international criminal court should complement national criminal courts and should exercise its jurisdiction only when special circumstances so warranted. Slovakia supported in principle the Commission's recommendation that an international conference of plenipotentiaries should be convened to study the draft statute and conclude a convention on the establishment of an international criminal court, and supported the idea that further preparatory work should be done by an ad hoc committee or working group in the next inter-sessional period before a decision was taken on convening such a conference.

56. On the topic of the law of the non-navigational uses of international watercourses, Slovakia felt that the community of nations would be well served by the rules proposed by the Commission once they had been embodied in an international convention. The draft articles as finally adopted showed the positive influence of new concepts such as that of sustainable development, and were conceived so as to constitute a solid basis for a framework convention. There was no doubt that bilateral or regional agreements on the utilization of specific international watercourses would continue to play a prominent role in

the future, and would constitute a lex specialis operating in parallel with the proposed framework convention; however, States would henceforth find inspiration in the draft articles when negotiating such agreements. His delegation commended the Commission on its decision to include provisions on settlement of disputes in the draft articles and stressed the useful role which could be performed by the proposed fact-finding commission in dispute settlement. While not opposed to the proposal that the General Assembly might elaborate a convention, his delegation preferred the alternative approach, in view of the complexity of the issues involved, of convening a diplomatic conference, possibly in the spring of 1996.

57. Turning to the topic of State responsibility, he said that it was premature to comment on the draft articles on countermeasures while work on draft article 12 was still incomplete. On the issue of the legal consequences of crimes, Slovakia considered that the distinction between crimes and delicts was fully justified and well rooted in contemporary international law. While acknowledging that the language of article 19 of part one of the draft articles could be further improved at second reading by, inter alia, moving the list of examples in paragraph 3 to the commentary, his delegation saw no reason to question the concept of international crime as reflected in article 19. However, the Commission should attempt to find an alternative to the term "crime", which might lead to confusion because of its criminal law connotations. In his delegation's view, there was no criminal responsibility of States in international law, and international responsibility should not be equated with that under criminal or civil law. The crime/delict distinction was based on a difference in the nature of the breach, rather than in its gravity. A closer link should be established between the concept of peremptory norms, or jus cogens, and the concept of an international crime. Each and every breach of a peremptory norm should be considered an international crime: it was absurd to speak of more serious and less serious breaches of a peremptory norm, just as it would be absurd to speak of more and less serious aggression, or of more and less serious genocide. However, it had also to be conceded that there was as yet no general agreement as to what rules had a peremptory nature. For instance, his delegation seriously doubted whether the principle pacta sunt servanda was of a peremptory nature. The breach of a peremptory norm affected the whole international community, and should entail responsibility of the law-breaking State vis-à-vis the whole international community, not just vis-à-vis the directly injured State. Consequently, the new legal relationship of international responsibility was an erga omnes relationship, permitting no inter partes derogation.

58. The Commission should now focus on determining the legal consequences of international crimes of States, by defining the content of international responsibility for international crimes as opposed to responsibility for delicts. His delegation considered that there was no difference as far as the obligation of cessation of a wrongful act was concerned. Concerning restitution in kind, the restrictions normally applying thereto, such as the excessive onerousness of such restitution should not be applicable. Satisfaction should include the obligation to institute criminal proceedings against or extradite those who, in exercising public authority, had participated in the preparation

or perpetration of international crimes attributed to a State. Guarantees of non-repetition should be stricter than in the case of delicts, and should include the entitlement of the international community to adopt measures which might in other circumstances be regarded as interference in domestic affairs.

59. After so many years devoted to the search for a satisfactory approach, the Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law had finally borne fruit. It was still too early to conclude that the topic was ripe for codification in the form of an international treaty, but the work done by the Commission could now provide valuable guidance for States in their practice.

60. Slovakia fully supported the view expressed by the Commission in paragraphs 398 and 399 of its report, regarding the essential need for the continued provision of summary records of its proceedings. It was to be hoped that the current practice of providing summary records, and of publishing them in volume I of the Yearbook of the International Law Commission, would continue.

The meeting rose at 1 p.m.